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REPORTS OF CASES

DECIDED BY

THE LORD CHANCELLOR

AND

VICE-CHANCELLOR.

By BASIL MONTAGU AND JOHN MACARTHUR, Esqrs.

BARRISTERS AT LAW AND COMMISSIONERS OF BANKRUPTS.

AND

A DIGEST

OF THE CONTEMPORARY CASES RELATING TO BANKRUPTCY
IN THE OTHER COURTS.

VOL. I.

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LORD CHANCELLOR:

The Right Honourable JOHN EARL of ELDON — re-
signed the Great Seal April 30, 1827.

The Right Honourable JOHN LORD LYNTHURST.

VICE-CHANCELLOR:

SIR JOHN LEACH — resigned, on being appointed Master
of the Rolls, 3d May 1827.

SIR ANTHONY HART — resigned, on being appointed
Lord Chancellor of Ireland, 29th October 1827.

SIR LAUNCELOT SHADWELL.

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CASES

IN

BANKRUPTCY.

Ex parte CARPENTER.—In the matter of JOHNS.

V. C.
LINC. INN,
August 10,
1826.

THIS was the petition of *Charles Carpenter*, and stated that in and previous to the year 1818 he carried on the business of a banker in partnership with *J. St. Aubyn*, *T. Shiells*, and *H. J. Johns*; that in December 1818 this partnership was dissolved by deed, by which it was agreed that the petitioner and *J. St. Aubyn* should retire, and that the business should be carried on, in future, by *Shiells* and *Johns*, who undertook to indemnify the outgoing partners against all outstanding demands; that the new firm was continued until the 2d of October 1825, when *Shiells* died; and that on the 8th of the same month a commission of bankrupt issued against *Johns*.

In December 1818, A. B. C. and D. dissolved partnership as bankers by deed, by which it was agreed that A. and B. should retire, and the business be carried on, in future, by C. and D. C. and D. covenanted to indemnify A. and B. against all outstanding demands. In October 1825, C. died, and a commission issued against D. A. having been obliged to pay

The petition further stated, that after the bankruptcy the petitioner had been obliged to pay certain debts due certain partnership debts which C. and D. had undertaken to indemnify him against: Held, that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818.

1826.

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Ex parte
 CARPENTER.
 In the matter
 of
 JOHNS.

at the time of the dissolution, against which *Shiells* and *Johns* had covenanted to indemnify him, and that the commissioners had rejected a proof tendered by him in respect of the debts so paid, on the ground that the petitioner knew the firm to have been insolvent at the time of the dissolution, and that the deed of December 1818 ought, therefore, to be considered void as against the creditors of *Shiells* and *Johns*.

Mr. *Montagu* and Mr. *Fonblanque* for the petition : —

The rejection of the proof must have been either, 1st, Upon the ground that a partner is not a surety within the 52d section of 6th Geo. 4. c. 16., which is clearly a mistake; *Wood v. Dodgson*, 2 M. & S. 195; *ex parte Young*, 2 Rose, 40; 1 *Montagu* on Partnerships, p. 90, in notes; or, 2dly, Upon the ground of fraud, as the firm was, in fact, and was known by the petitioner to be, insolvent at the time of the dissolution. With respect to the fraud, it must either have been against the remaining partners, *Shiells* and *Johns*, which could hardly be pretended, or against the old creditors, which was not the fact, as no dissolution could deprive them of their rights, and all the debts were paid; or, lastly, it must have been against the new creditors. As to them, it was clear that the mere dissolution, with a knowledge of insolvency, did not give new creditors a right against the retiring partners; *ex parte Peake*, 1 Mad. 346; 2 Rose, 455; and it was as clear that a case of fraud might be established by which the new creditors would be entitled to be preferred to the retiring partners. Fraud would vitiate such a contract: this may be admitted; but, admitting it, what application has the doctrine to the present case? A partnership is dissolved in the year 1818, and the business is

continued until the year 1825, and it would, probably, have been continued many years longer, but for the death of *Shiells*.

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Mr. *Heald* and Mr. *Glyn* for the assignees: —

The firm was insolvent in the year 1816: this the petitioner virtually admits, for although he contends that the firm was not insolvent, because the private property of the respective partners was, with the joint property, more than sufficient to pay all the debts both joint and separate, this is not a solvent partnership in the contemplation of law; and the amount of the deficiency at that time appears to have been nearly 17,000*l.*, for the affidavit of Mr. *Carpenter*, stating, that the cash in the house was not computed at the time of the deficiency, will not reduce that deficiency more than the average amount of cash in the *till* at the time of the computation. In addition to these observations, there are false recitals in the deed, as to the solvency of the house, by which it clearly appears that fraud was intended.

Mr. *Montagu* in reply: —

Although in the construction of law the partnership was not solvent, this partakes more of fiction than reality, as there were funds sufficient to pay every creditor. Suppose, for instance, each of these four partners had, at the formation of the partnership, been worth 100,000*l.*, and had united, without either of them bringing in any capital for the partnership purposes; could it have been contended, on dissolving the partnership, that the firm was insolvent, because it had received a small sum, of which part had been expended on the joint account? But whether the insolvency was real or imaginary is of

CASES IN BANKRUPTCY.

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no importance, because, for the reasons already assigned, insolvency without fraud is not sufficient to bar the right of the retiring partners. With respect to the false recitals in the deed, for what purpose could they have been introduced? It is not pretended that any creditors were misled by them; nor could the parties have intended to mislead themselves. The deed must have been prepared according to some precedent, supposed applicable to every case of dissolution.

The Vice-Chancellor said, that if the respondents thought they could adduce any evidence of fraud, they ought to have an opportunity so to do; and for this purpose the petition stood over for some time, but ultimately came on again without any additional evidence.

The VICE-CHANCELLOR :—

I desired this case to stand over, considering that the transactions warranted suspicion, and that time being given, the respondents might be enabled to turn those suspicions into something like facts. But the petition now returns upon me without any new light being thrown upon the case. It appears that in the year 1818, Mr. *Carpenter*, being a member of a banking establishment, and wishing to retire from it, a deed was executed, by which the business was left to the continued management of two partners, of the names of *Shiells* and *Johns*; and that they, taking the concern in its actual state, agreed to indemnify *Carpenter* against all debts of the partnership. He, therefore, retired as if the partnership was solvent. But from the evidence it seems, that in the year 1816 the partnership was not solvent, because, although Mr. *Carpenter* says that he did not consider it

to have been insolvent, taking the private property of the partners into consideration, that is not, in the contemplation of a court of justice, a reason why the partnership should not be considered insolvent. If the concern itself be not equal, with its own assets, to the payment of its own engagements, then, in the contemplation of a court of justice, the partnership is insolvent, even although the partners may have separate property which will enable them to pay the joint debts. The reasons, therefore, which Mr. *Carpenter* assigns for his alleged belief in the solvency of the house are insufficient, in the view which the Court takes of the matter. He says there was a deficiency of partnership property to the amount of 17,000*l.*, but that in computing that deficiency, no notice was taken of the cash actually in the house, and that there must have been cash in the house, because every banking establishment is necessarily provided with cash to answer the regular and current demands of customers.

1826.

Ex parte
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In the matter
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JOHNS.

It may fairly be taken for granted, that, in 1816, *Carpenter* and also *Shiells* and *Johns* knew that the partnership was insolvent. In the year 1818, *Carpenter* seems to admit that the state of the partnership was not improved; but it does not follow that the deed was fraudulent because *Carpenter* was permitted to retire by the other two partners without paying them any proportion of the actual deficiency. Were not those persons as well informed of the actual state of the concern as *Carpenter* himself? They were parties to the plan by which the insolvency of 1816 was ascertained; and they were, in truth, the partners who had the active management of the concern. They had a much more intimate acquaintance with the state of the concern; and yet with a full

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Ex parte
 CARPENTER.
 In the matter
 of
 JOHNS.

knowledge of the insolvency of the partnership, they thought fit, with a view to future profit, to indemnify *Carpenter*, without taking from him his proportion of the deficiency. If, with such knowledge, they considered it expedient so to do, how can the deed be considered a fraud upon them? It can never be said here that their object was to let *Carpenter* escape; that they looked to a bankruptcy, and were, therefore, quite indifferent as to what might happen to themselves; and that the whole scope of the deed was to allow *Carpenter* to get clear out of the transaction. All that has passed shews that such could not possibly have been their object. There is no suggestion to that effect on the affidavits; and that it was not with such a view is evident; for instead of bankruptcy following to justify the supposition that *Shiells* and *Johns* meant to sacrifice themselves to *Carpenter*, in order to defraud the creditors by withdrawing *Carpenter's* property, *Shiells* and *Johns*, having thus purchased the share of *Carpenter*, continued to carry on the business for seven or eight years. It is impossible, therefore, to support such a suggestion, or to contend that it was their intention unfairly to sacrifice themselves, when it appears by the evidence in the case, that *Shiells* and *Johns*, with full knowledge of the insolvency of the house, thought fit to permit *Carpenter* to retire, upon the terms of assigning his share to them, without calling upon him to pay his proportion of the actual deficiency. They must have been impressed with the notion that it was worth their while to make that sacrifice; and it can never be stated for them — for it is on their behalf that fraud is sought to be established — that there was fraud as against them. The parties who represent them now say that this was a fraud. I think it could not be a fraud upon them. That there are false recitals in the deed, and that there

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was incorrectness in the settlement, is clear; but that is not sufficient, unless a fraudulent intention be also shewn. The proof must be admitted.

Ordered accordingly.

1826.

Ex parte
CARPENTER.
In the matter
of
JOHNS.

Ex parte FARQUHAR. — In the matter of
STARKEY.

V. C.
August 16,
1826.
L. C.
August 14,
1827.

ON a petition, by mortgagees, praying for a sale, it appeared that one of the mortgages was executed by the bankrupt on the 18th of February 1826, and that the commission issued on the 18th of April following. An act of bankruptcy was alleged to have been committed prior to, or on the 18th February 1826.

Under 6 Geo. 4.
c. 16. s. 81. where
the computation
of time is to be
from an act
done, the day
when such act
is done is to be
included: For
some purposes
the Court
notices the frac-
tion of a day.

Mr. *Heald*, Mr. *Rose*, and Mr. *Knight*, for the assignees, submitted, amongst other points, that under the 6 Geo. 4. c. 16. s. 81. all conveyances by a bankrupt are rendered invalid, unless “*bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission;” that as more than two calendar months was required, and as the fraction of a day could not be noticed, there must be one whole day after the expiration of the two calendar months, in order to bring the case within the protection of the statute.

Mr. *Sugden*, Mr. *Glyn*, and Mr. *Macarthur* for the petition: —

Where time is to be computed from an act done, the day when such act is done is to be included. The *King v. Adderley*, Doug. 463; *Castle v. Burditt*, 3 Term Rep. 623; *Glassington v. Rawlins*, 3 East, 407; and in

1826.

Ex parte
FARQUHAR.
 In the matter
 of
STARKEY.

some cases, particularly where the interests of third persons are affected, courts of law are in the habit of noticing the fraction of a day, *Thomas v. Desanges*, 2 B. & A. 586. Here the computation of the two calendar months must be from the act done, namely, the execution by the bankrupts of the indenture of mortgage, and the 18th day of February should, therefore, be included in the reckoning. According to this calculation, the two calendar months expired at the end of the 17th day of April, and any fraction of time, on the 18th of April, would be sufficient to bring the case within the words "more than two calendar months."

The VICE-CHANCELLOR (Sir *John Leach*) was of opinion, that one day must be reckoned inclusive, and the other exclusive; that the two calendar months expired with the 17th day of April, and that any fraction of the day on the 18th was sufficient to bring the time within what was required by the words "more than two calendar months."

August 14,
 1827.

On appeal to the Lord Chancellor, the same point was again raised, and his Lordship expressed a similar opinion; observing, that in cases of this description, where, under the statute, time is to be computed from an act done, the day on which the act is done should be included in the computation, and that here, after the commencement of the 18th day of April, more than two calendar months must be held to have elapsed. (a)

(a) As to the fraction of a day more generally than the civil law. being admitted in bankruptcy, There is no general rule, applicable to all cases, in computing time from an act or an event. see *ex parte D'Obree*, 8 Ves. 82; *Wydown's case*, 14 Ves. 87; *ex parte Dufrene*, 1 Ves. & B. 54. *Lester v. Garland*, 15 Ves. 257. Our law rejects fractions of a day

Ex parte BARNES and others. — In the matter of
DANIELL.

Monday,
Nov. 26,
1827.

A PETITION had been presented for a new trial of an issue upon a question of usury, which depended upon the evidence of a witness named *Bramley*.

Affidavit verifying proceedings at law not evidence; and taken off the file, with costs.

Pending the petition, the same question, and in the same bankruptcy, had been tried in two actions upon the evidence of the same witness. As evidence of what had passed on such trials, an affidavit was made by a short-hand writer "that he was employed by the plaintiffs' attorneys to take notes of the proceedings on the trial of an action in the Court of King's Bench before Lord *Tenterden*, on," &c.; "and this deponent saith, that the following is a true and correct transcript of the evidence given on the trial by *H. Bramley*, who was examined as a witness on behalf of the defendants, and of the charge delivered by Lord *Tenterden* to the jury."

The affidavit then contained the short-hand writer's notes.

This was a petition to take the affidavit off the file, with costs for irrelevancy.

The LORD CHANCELLOR said, This is a verification by affidavit of proceedings at law, and cannot be received in evidence; it must therefore be taken off the file, with costs.

Mr. *Treslove* for the petitioner.

Mr. *Montagu contra*.

L. C.
East. Term,
 May 10,
 1828.

Commission sealed, but not opened, cannot be superseded, at the instance of the petitioning creditor, without serving the bankrupt, or shewing that he cannot be found.

Ex parte FORTH. — In the matter of COOKE.

THIS was a petition by the petitioning creditor, praying that the commission which had been sealed, but not opened, might be superseded, on the ground that there was a want of evidence of recent trading sufficient to support the commission.

The person against whom the commission issued had not been served with the petition.

Mr. Knight for the petition.

The LORD CHANCELLOR thought the bankrupt must be served, as he might be desirous of shewing cause against the application. His Lordship having inquired whether there had been any decision on the subject, the petition stood over that search might be made at the Bankrupt Office as to the practice.

May 19. *Mr. Knight* again mentioned this petition, and said, he understood that Lord *Eldon* was in the habit of granting a qualified order, in such cases, to supersede the commission, without prejudice to any action or proceeding of the bankrupt touching the issuing of the commission.

The LORD CHANCELLOR: —

There are two reported decisions of the Vice-Chancellor on this point (*a*); and I am informed, that the

(*a*) *Ex parte Barber, Buck*, p. 23. See also *ex parte Prowse*, p. 493. Anonymous, 1 *Gl. & Jam.* 1 *Gl. & Jam.* p. 94.

qualified order referred to was only granted by Lord *Eldon*, in cases where the bankrupt could not be found, or, having been served, did not appear to oppose the application. According to the practice, therefore, the bankrupt must be served, or it must be shewn that he cannot be found.

1828.

Es parte
FORTH.
In the matter
of
COOKE.

Order refused. (a)

In the matter of LEVY.

PETITION by a creditor to supersede a commission which had not been opened, on two grounds :

1st. That it had been procured by the petitioning creditor, in concert with the bankrupt, to enable the latter to dispose of goods which he had fraudulently obtained from various persons on the eve of the bankruptcy.

2dly. That the commission, which was directed to commissioners in London, could be more conveniently executed at Birmingham, where the bankrupt and his

L. C.
East. Term,
May 10,
1828.

Commission superseded, upon a petition presented on the 13th day from the date of the commission, on the ground of fraudulent collusion between the bankrupt and the petitioning creditor.

(a) *Mr. Montagu* has suggested the following queries as to the existing practice :

Query 1. Can the bankrupt have any right in preserving an unopened commission ?

Query 2. If he has any right, can he compel the petitioning creditor to open ?

Query 3. If he has any right,

is it not before the Lord Chancellor,—the right to have the bond assigned ?

Query 4. May not the necessity of serving the bankrupt enable him to preserve a commission not intended to be opened, so as to prevent the issuing of an effectual commission ?

1828. creditors resided, and where there would be better opportunities for detecting the frauds.
 ———
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Mr. *Sugden* and Mr. *Knight* for the petition :—

The docket was struck on the 16th of April 1828 ; the commission is dated 23d April ; — between the 23d of April and the 2d of May no attempt whatever was made to open the commission. The time for declaring the bankruptcy was the 7th of May, and on the 6th it appears that the petitioning creditor was at Cheltenham. In the meanwhile, the bankrupt has time given to him to dispose of the goods, to a large amount, which he fraudulently obtained on the eve of the bankruptcy. We are ready to admit that the delay which has taken place is justified by the words of Lord *Rosslyn's* order (a) ; but we say that it is not justified according to the spirit of that order, because the commission has been used only as means of enabling the bankrupt to commit a fraud, and to prevent the issuing of a *bonâ fide* commission.

Mr. *Twiss* and Mr. *Montagu* *contra* :—

The petitioning creditor has a right, by the order, to fourteen days. He was absent from London, but would have attended at the opening of the commission on the 14th day, had not this petition been presented on the 13th day, by which the proceedings were stayed. If the

(a) Lord *Rosslyn's* order of the 26th of June 1793 directs that any commission “to be executed in the city of London shall be supersedeable for want of prosecution at the expiration of 14 days, and not sooner, after the date thereof ;” but that one day shall elapse after the expiration of the 14 days before any order shall be made for such *superseas*.

object of the petitioners was to prevent this alleged fraud, they would have presented a petition, not on the eve of the 14th day, but soon after the commission was issued, when, according to the regular course, a petition might have been presented to issue a new commission, without prejudice to the question which commission should ultimately stand. But this allegation of fraud is merely pretence, and without any foundation: the real object of the petition having been to obtain the commission without waiting until the next day, when, if the bankruptcy had not been found, the right to petition for the commission would have been opened to all the creditors, and have been regulated by Lord *Erskine's* order. (a)

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With respect to the preference of a country to a London commission, it cannot be doubted that justice would be better administered in London; and it is the administration of justice, and not the comparative number of creditors in town or country, by which the Court is influenced. There is no instance of superseding a commission, because it is directed to a place at a great distance from the residence of the major part of the creditors. (b)

The LORD CHANCELLOR:—

It appears from the affidavits that the bankrupt, whose usual place of residence was Birmingham, purchased goods at Manchester, on credit, and as soon as they arrived at Birmingham, conveyed them away for the

(a) Order of 29th December 1806. 1 *Rose*, 48. In the matter of *Child, Buck*, 425. *Ex parte*

(b) See *ex parte Bowdler, Fellowes*, 2 *Madd.* 141.

1828. purposes of fraud. The imputation against the petition-
 In the matter of Levv. ing creditor is delay, in collusion with the bankrupt, to
 assist in this fraudulent proceeding; and although called
 upon for explanation, in reply to the affidavits filed, he
 has failed to give any.

On the 6th of May, he was at Cheltenham, and the Court must infer that he had no *bona fide* intention of proceeding with the commission. I think there is abundant evidence of fraudulent collusion between the petitioning creditor and the bankrupt, and that the commission ought to be superseded, with costs.

Ordered accordingly.

As to the general order of the 26th June 1793, admitting of exceptions, see further *ex parte Freeman*, 1 *Rose*, 380; 1 *V. & B.* 34; *ex parte Ellis*, 7 *Ves.* 135; *ex parte Knight*, 2 *Rose*, 319; *ex parte Soppit*, *Buch*, 81; *ex parte Henderson*, 2 *Rose*, 190; *Cooper*, 227.

In the matter of THOMAS COLEMAN and EDWARD WELLINGS of the Ludlow Bank; and in the matter of THOMAS COLEMAN, JOHN MORRIS, J. B. MORRIS, and T. MORRIS, of the Leominster Bank.

V. C.
May 19,
1828.

A PETITION had been presented by the assignees under the commission against the Leominster Bank, which had issued on the 30th March 1826, to supersede the commission which had issued on the 29th March 1826, against the Ludlow Bank, as far as related to *Thomas Coleman*. (a)

A commission against T. C. and three others, superseded as to T. C., on the petition of the assignees, under a commission previously issued against T. C. and another.

The Vice-Chancellor (b) thought the Court had not jurisdiction, as the commission which had first issued was the legal commission; and the Lord Chancellor, for other reasons, concurred with the Vice-Chancellor in thinking that the commission ought not to be so superseded.

This was a petition by the assignees under the commission against the Ludlow Bank, to supersede the commission against the Leominster Bank, as far as related to *Thomas Coleman*. (c)

(a) See the case reported 2 Gl. & Jam. 344.

(b) Sir Anthony Hart.

(c) 6 Geo. 4. c. 16. s. 16. is as follows: "and in every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such

commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person as to whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected."

1828. Mr. *Montagu* for the petitioner.

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of
COLMAN
and others.

Mr. *Bickersteth* and Mr. *Wakefield* stated, that it might be deserving consideration, whether the Court had jurisdiction so to supersede a commission which was invalid, another legal commission being in operation against *Thomas Coleman*.

The VICE-CHANCELLOR, upon referring to *ex parte Bygrave*, 2 Gl. & J. 391, made the order as prayed. (a)



L. C.
LINC. INN,
July 23, 24,
1828.

Ex parte B. BAXTER.—In the matter of CHARLES BAXTER.

Order made that a witness, who had been twice committed by commissioners of bankrupt, should be again examined by them, on tendering to the solicitor under the commission the costs of the meeting, and of being brought up.

THIS was a petition of *B. Baxter*, a prisoner in Newgate, that the commissioners should be directed to meet forthwith, for the purpose of taking his further examination, and that the expence of the meeting should be paid out of the bankrupt's estate.

The petitioner, who was the brother of the bankrupt, had been examined under this commission, and committed on the 28th of March last, for not satisfactorily

(a) In a recent case, the Court of King's Bench determined that a second commission issued against a trader, before a former commission has been disposed of, is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission." See *Till v. Watson*, 7 B. & C. 684. "is a nullity, inasmuch as there

answering the questions put to him by the commissioners. On the 9th of May he was, on his own application, again examined, and again committed for the same cause. He, upon this recommitment, obtained a writ of *habeas corpus* from the Court of King's Bench; but the Judges, being of opinion that his answers were unsatisfactory, remanded him to prison. He then made various applications to the commissioners (a), and to the solicitor under the commission, to be re-examined, and tendered to the latter, a sum sufficient to defray the estimated expences of a private meeting. Instead of accepting this, he was required to give an undertaking of his solicitor in writing, to pay "the expences of and consequent upon the proposed meeting to be taxed by the commissioners;" but declining to consent to these terms, and having failed in an application to the Court of King's Bench for a *mandamus* (b), the present petition was presented.

1828.

Ex parte
BAXTER.
In the matter
of
BAXTER.

Mr. Barber for the petition: —

Unless this petition be successful, the imprisonment may be interminable. The form of the commitment is to be detained "without bail or mainprize, until such time as he shall submit himself to us the said commissioners, and full answer make, to our satisfaction, to the questions so put to him by us as aforesaid." The witness now offers to do what the commitment requires of him, and for not doing which he was committed; — to submit himself, and answer fully the questions put to him by the commissioners.

(a) "The party committed answer the questions." *Rex v. Jackson*, 6 T.R. 654, per Buller, J.
must send word to the commissioners when he will submit and

(b) See *post*, page 21.

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The warrant follows the terms of the authority given by the act of parliament. The 6th Geo. 4. c. 16. s. 34. empowers the commissioners, if any person "shall not fully answer to their satisfaction," "to commit him to such prison as they shall think fit, there to remain, without bail, until he shall submit himself to them to be sworn, and full answer make to their satisfaction," &c. But it is silent respecting costs or expences. No power is given to enforce the payment of either. What the act does not authorize, therefore, the commissioners can have no right to require. In *ex parte Graham*, 2 Bro. C. C. 49, Lord *Thurlow* directed a meeting to receive the bankrupt's further examination, observing that the commitment was until conformity, and that the form of the commitment was conclusive; and in *ex parte Cohen*, 18 Ves. 294, Lord *Eldon* also directed a further examination of the bankrupt, and that if there were no effects, the commissioners should meet *gratis*, receiving their fees out of the future effects, if there should be any. In these cases, certainly, the bankrupt was the party; but there is no sound distinction between the situation of the bankrupt and of the petitioner. He is a minor, and, if the commissioners have the right to impose conditions for his release, his present commitment might be tantamount to perpetual imprisonment.

But even supposing the Court has jurisdiction to impose conditions, the question will be, whether, in tendering the costs of the meeting, he did not offer all that could be reasonably required of him?

Mr. *Rose contra*: —

The costs already incurred have been large. The petitioner was committed, brought up for further ex-

amination, and recommitted. The terms sought to be imposed are intended only to cover the consequential expences; and the struggle is, by which party those expences are to be borne. It was so considered by the Court of King's Bench, on the application for a *mandamus*. No precedent has been cited for a petition of this kind; for the jurisdiction of the Lord Chancellor, in dealing with commitments, when sitting in bankruptcy, is very different from the authority exercised by him and the other Judges, upon the return to a writ of *habeas corpus*. (a) The case of *ex parte Graham* related to a meeting for taking the bankrupt's *surrender* and *examination*, the time for which the Lord Chancellor was empowered by statute to enlarge. (b)

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The order in *ex parte Cohen* was, apparently, for the same purpose. But this appeal is entirely to the discretion of the Court, and the Lord Chancellor has not been in the habit of dealing directly with commitments, upon petition, but only of impressing upon the commissioners, by his advice, the expediency of reviewing their decisions. After the repeated examinations, and the expence occasioned, the assignees are bound to protect the estate against further costs. In *ex parte Cohen* Lord Eldon said, that if the bankrupt "should be again committed for not answering fully, he would find it very difficult to obtain another order to bring him up." Here, if the party had no other remedy, the case would be strong; but supposing him to have been improperly imprisoned, he may have redress by an action.

(a) See the observations of (b) By 5 Geo. 2. c. 30. s. 3., Lord Eldon in *ex parte Hiams*, and now by 6 Geo. 4. c. 16. s. 113. 18 Ves. 244; and *ex parte Oliver*, s. 113.

1 Rose, 407; 2 Ves. & B. 244.

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The LORD CHANCELLOR, after referring to the opinions of Lord *Tenterden* and Mr. Justice *Bayley* (a), said :

As the expences of another meeting for the re-examination of the petitioner are occasioned by his own misconduct, it would be unjust to impose them upon the estate. It is no less clear, that as they arise from the gross misconduct of the prisoner, they ought, in all fairness, to be paid by himself. He comes here seeking relief from the Great Seal, and the only means of affording that relief is by the proposed meeting of the commissioners. If he had answered satisfactorily, he would have been entitled to his discharge ; but as by his former obstinacy he prevented that, and as the same consequences may again arise from the same cause, it is fitting that the estate should be guarded against them.

I do not think it reasonable, however, to require the undertaking of his solicitor, and it appears unnecessary ; for if the petitioner should be again remanded, and should again apply to the Court, it will take care to impose, as a condition, the payment of such costs as the estate may be subjected to. It is upon a consideration of the petitioner's misconduct that I found this order.

Ordered, That the petitioner shall be again examined, on tendering to the solicitor, under the commission, the costs of the meeting and of being brought up.

(a) See *post*, page 21.

COURT OF KING'S BENCH,

Trinity Term, June 12th.

Ex parte BENJAMIN BAXTER. — In the matter
of CHARLES BAXTER.

K. B.
Trin. Term,
June 12,
1828.

MR. PLATT moved for a writ of *mandamus* to be directed to the commissioners in this matter, commanding them forthwith to make such order as should be necessary for the purpose of bringing before them *Benjamin Baxter*, whom they had committed to Newgate for not satisfactorily answering certain questions on his examination before them. The object of the application was, that the party might be brought up, in order to have another opportunity of answering the questions of the commissioners.

Lord *Tenterden*.—Is there any instance of the Court granting a *mandamus* under such circumstances? The usual course, I believe, is to apply by petition to the Great Seal.

Mr. *Platt*.—I am not aware of any instance where such an application has been made; but unless it be entertained by the Court, the party will be without remedy, and subject to imprisonment for life.

Mr. Justice *Bayley*.—He may petition the Great Seal; that is his remedy. He has, by his own misconduct, forced the commissioners to commit him, and he now seeks to be relieved from the consequences of that misconduct.

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Mr. *Platt*.—The act of parliament says, that he shall be committed only until he answers to the satisfaction of the commissioners; he says he is now ready to answer their questions to their satisfaction, and, therefore, he desires to be brought up; he does not require the estate to pay his costs; he only wishes to avoid having to pay the costs of the assignees. I am not aware of any similar case, but the Court possesses authority to command an inferior Court to do its duty.

Lord *Tenterden*.—We cannot say that we have authority, or that it is the commissioners' duty to direct the party to be brought up at the expence of the bankrupt's estate. What right has he to charge the estate with the costs of another examination? The application is made at the instance of a person who has conducted himself improperly, and the struggle is whether he or the bankrupt's estate shall pay the expence occasioned by his misconduct. There will be the expence of a meeting, which must be paid by somebody; but are we to say that it shall be paid out of the estate, in a case where the party applying has caused himself to be committed? It is not proper that a party who has misconducted himself should be relieved from the expence which his improper conduct has occasioned.

Rule refused.



COURT OF EXCHEQUER,

Easter Term, May 13, 14, 1828.

Ex parte ISAAC. — In the matter of OWEN.

EXCHEQ.
East. Term,
May 13, 14,
1828.

IN this case a writ of *habeas corpus* had issued out of the Court of Exchequer, on the application of *A. Isaac*, who had been summoned "as a person capable of giving information concerning the person, trade, dealings, or estate of the bankrupt (*a*)," and examined by the commissioners, several times, in order to ascertain whether certain securities were not affected with usury. In the progress of these examinations, the witness was four times committed. On the first occasion, he was remanded, and on the second, discharged by the Lord Chancellor. On the third occasion, being brought up before the Court of King's Bench, he was remanded; and on the fourth application, the present case arose. A question had been raised, on behalf of the witness, throughout the greater part of the proceedings, as to the legality of the course of examination pursued, on the ground of its tendency to expose him to forfeiture of estate or interest, and objections were from time to time raised and entered on the proceedings; but upon this point it became unnecessary for the Court to pronounce any judgment.

A witness summoned by commissioners under 6 Geo. 4. c. 16. s. 33., being required and having refused to read certain entries in a ledger, to which he had previously referred during his examination, but which he had not been called upon to produce, was committed by them "for refusing to answer a question." Held, that the warrant was bad in substance and in form, the request to read not being a question.

L. C. 34. 4/2.

From the warrant it appeared, that at the last meeting the witness had been examined with respect to particular sums of money entered in his own books of account, and he had stated, that a sum of 9,000*l.* was

(*a*) 6 Geo. 4. c. 16. s. 33.

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composed of two sums, being the proceeds of Russian stock, the property of a Mr. *Leon*.

The examination then proceeded as follows:—

“ Q. Does the account, headed Russian stock, in ledger G. p. 101, contain an account of all the purchases and sales of Russian stock, for Mr. *Leon*’s account, made by you?

A. Yes, it does, as well as those purchased by *Leon* himself.

Q. Do you mean to state, that in such account there are entries of Russian stock purchased and sold, or purchased or sold by Mr. *Leon* himself, on his own account?

A. Yes; both bought and sold by Mr. *Leon* himself.

Q. Refer to ledger G. and the account in it headed Russian stock?

A. I have now referred to it.

Q. You are now requested to read all the entries in that account?

A. Acting under the advice of my counsel, I demur to answer the question, inasmuch as the matters in that account are not relating to the bankrupt *Owen*: it is therefore, I submit, with the advice of my counsel, that I am not bound to read the entry; and I request the commissioners to allow me to consult my counsel on the propriety of the question put, so that I may give a proper and legal answer to it. But in case the commissioners refuse, I request that the counsel may be allowed to enter for me such proper protest as he may see necessary. When I say that I demur to answer the question, I mean to say that I refuse to comply with the request to read the entries contained in the account alluded to.”

The warrant then concluded in the following terms : —
 “ Which last question the witness having so refused to answer, these are therefore, &c. him to keep without bail, &c., until such time as he shall submit himself unto us, the said commissioners, &c. and full answer make to our or their satisfaction to the said question.”

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Mr. *Knight* and Mr. *O. Anderdon* for the prisoner.

Mr. *Rose* and Mr. *Wright contra*.

The *Lord Chief Baron*. — Several important points have been argued before us upon this return. It has been, in the first place, made a question, whether the account, which formed the subject of the examination and commitment, is material in the sense in which that word is to be understood, with reference to what had been previously elicited.

Then it was contended, on behalf of the prisoner, that he was not bound to answer, inasmuch as the case raised by the parties examining him, was one which had a tendency to subject him to penalty or forfeiture. I profess not to proceed on either hypothesis. I do not intend to give any opinion on these points, it not being necessary to do so, as this warrant cannot be supported on the particular ground on which it purports to be founded. In these cases, the law requires great strictness in the warrant. The powers entrusted to commissioners of bankrupt are large, and ought to be exercised with caution. The act of parliament gives a power of commitment in the cases of refusal to answer lawful questions, and refusal to produce books, having no lawful excuse. Now, upon which of these grounds does this commitment proceed? It is admitted that it does not

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appear upon the warrant that the witness was ever called upon to produce the book, out of which he was thus required to read the entries; so that if it be taken on the footing of a refusal to produce, there is nothing to proceed upon in respect of such refusal.

I am unable to discover upon what grounds the commissioners have proceeded. They profess to ask a question, and to commit for not receiving an answer. He is commanded to read, but whether to read in his own mind, or to read aloud, is not expressed: he is simply called upon to read, and this he declines to do. Now it is clear that this is not within the clause of the act of parliament enabling them to ask questions. If it be said that this is substantially a requisition to produce, it should appear that he had been duly required to do so. I admit that production imports inspection; but he is committed for declining to read, either to himself or aloud, neither of which had they any ground to insist upon, or power to enforce. For these reasons, I think the warrant substantially defective.

Mr. Baron *Garrow*. — Finding an objection apparent on the warrant, I do not think it necessary to give an opinion on the points of law which have been raised. The warrant appears to me illegal, on the grounds stated by my Lord Chief Baron, in which I fully concur, and need not recapitulate.

Mr. Baron *Hullock*. — The warrant is invalid, and the commitment illegal. It seems clear, upon the general question which has been argued before us, that it is only in one view that the questions put to the party, who is stated in the warrant to have been summoned as a witness, can be deemed important or material. I

think it, however, proper to abstain from going into that question, the warrant being, on a distinct ground, immediately relating to the alleged cause of commitment, altogether bad, and to this I shall confine my observations.

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It is important to refer to the act of parliament that confers on the commissioners the authority under which they act. They have, unquestionably, a power to enforce the production of documents relating to the subjects of their legitimate enquiries. It is, however, to be kept in view, that theirs is a delegated power, and must be strictly construed according to the authority given. By the 33d and 34th sections of the bankrupt act, they have power to examine, and also to enforce production of documents. Here the party is professedly examined as one "capable of giving information concerning the trade, person, dealings, or estate of the bankrupt."

In point of law, there is no authority to inspect papers belonging to an individual, without first laying a ground for it. It is not because I carry my pocket book, to enable me to assist my memory, and that I have recourse to it for that purpose, that I can be compelled to submit it for inspection. What authority is here shewn on the part of the commissioners to command the witness to produce this particular book, to which it seems he had been referring in the course of his examination? When it appears that it is necessary, for the purpose of a full investigation of the subject, that a production should be made, then, without doubt, production involves inspection. But if such necessity do not exist, then an order for production is *coram non judice*, and an empty illegal command. Now, suppose in this case, the party being

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so commanded had, in fact, refused to produce (and that it could possibly be said that refusal to read was substantially the same thing) the particular book, it is not because the book happened to be lying upon the table that he was bound to allow it to be inspected. The demand ought to be preceded by a proper notice to produce it. Such a notice nowhere appears to have been given. But it has been urged that the party has, throughout the examination, uniformly acceded to the course pursued, of calling upon him to read from his books. It is true he has read, but he has done so for his own satisfaction, with a view to answer the questions he was compelled to answer, or to explain those answers; but it will scarcely be contended that, whether he has done this without having been bound to do so, or for his own satisfaction, he is, therefore, pledged to submit to read every thing the book contains, and that he may not stop when he no longer finds reading necessary for his own purposes, or for other reasons declines to go further. The present question is simply as to the propriety of the course pursued by the commissioners. It is clear that the conclusion of the warrant is not warranted by the premises. Upon the warrant, the Court has not any means of knowing that the witness was in any manner bound to produce the account, which forms the subject of the commitment. What, I would ask, is the proper course to be pursued when production has been enforced? Who is it that is bound to read the document produced in obedience to a lawful command? The document is to be used by the party who seeks to make it available to his purposes as evidence or otherwise. Supposing a book duly produced, it is the duty of the solicitor, or of the commissioners, to examine it, with a view to such enquiries as may be proper and requisite.

But to examine the peculiar language of this warrant : after having thus called upon this gentleman to read the book, which it may be taken he had lying on the table before him, (and whether to read to himself, or to read for the whole meeting to hear, is left wholly in doubt) and he having declined to comply with this species of mandate, what does the warrant communicate to us? Was he committed by the commissioners for refusing to produce? If he had been so committed, it would not appear that he had been called upon to do so, and, consequently, it could not be said, even in substance, that he had been properly committed for not producing. But on the contrary, the warrant informs us he is committed for refusing to answer the "said question." What question? — To read the entry. Can any man say that this command to read entries in a book is a question, a lawful question, as it must be? But what do they go on to say, and until when do they commit him — until he shall produce for inspection the book containing the entries? No; "until he shall full answer make to their satisfaction to the question so put to him" — which he can never do, for no question have the commissioners in fact put to him, and no question has he refused to answer. I am, therefore, clearly of opinion, that the warrant is bad in form and bad in substance.

Mr. Baron *Vaughan*. — I should be very sorry by any thing I am about to say, to weaken the power conferred by the legislature on this species of judicature; but it is unquestionably a power to be exercised with caution, and to be looked at with jealousy. As a bare authority, it must be strictly pursued. The commissioners have a plain line of duty marked out to them. By the act of parliament, a power is placed in their hands to examine witnesses, and require the production of documents relating to the matters

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to which they are empowered to examine, and in the event of a refusal to be examined or to produce the documents, a consequential power to commit. Now can it be said that what has been done in this case, falls within the clear and obvious rules prescribed by the act? Supposing these entries were proper to be inspected, what power is there to compel the party to read? The witness is committed for refusing to answer a question: how can it be said there is any thing like a question? He is then to remain in prison till he shall submit to answer the question, when in fact no question has been propounded to him. The warrant is clearly bad, and the party fully entitled to his discharge.

Ordered accordingly. (a)

(a) See the form of the commitment, and the Judgments of *Best, Js.* in the case of *Davie v. Milford*, 4 B. & A. 356. *Abbott, C. J.*, and *Bayley* and

Ex parte STRANGE and another, assignees of ALLMOND. — In the matter of ALLMOND.

V. C.
Trin. Term,
1828.
L. C.
Trin. Term,
June 25,
1828.

THE petition stated, that after the petitioners were appointed assignees, they discovered that certain debts had been proved by perjury and conspiracy; that a special meeting of the creditors was held, at which it was resolved, under the advice of counsel, that the petitioners, as assignees, ought to indict the petitioning creditor, and the solicitor to the petitioning creditor, for conspiracy, and the persons who had proved, for perjury. — They were accordingly indicted, but were eventually acquitted. The commissioners being doubtful whether they could, without order, allow the extra costs of the indictments, this petition was presented, praying that such costs might be allowed.

Extra costs, incurred by assignees of a bankrupt in conducting prosecutions for perjury and conspiracy, directed to be allowed under 6 Geo. 4. c. 16. s. 106.

Mr. *Montagu* for the petition :—

By the old bankrupt acts, 1 James 1. cap. 15. sections 11 and 12. (a), and 5 George 2. cap. 30.

(a) By the 1 Jac. 1. c. 15. s. 11 and 12. it was enacted as follows: "And if any person or persons, other than the bankrupt, either by subornation, unlawful procurement, sinister persuasion, or means of any others, or by his own act, consent, or agreement, shall wilfully and corruptly commit any manner of wilful perjury by his deposition to be taken before the said commissioners, or the greater part of them, as aforesaid, that then the party or parties so offending, and all and

every person and persons that shall unlawfully and corruptly procure any such unlawful, wilful, and corrupt perjury, shall or may therefore be indicted in any of the King's Majesty's Courts of Record, and after his or their conviction thereof, shall incur such forfeiture, and receive and suffer such pains and punishment, as are limited by the statute made concerning perjury in the fifth year of the reign of our late Sovereign Lady Queen Elizabeth.

"And be it further enacted

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section 29. (a), it was enacted, that if a person claiming to be a creditor perjured himself in swearing to or affirming his debt, he might be indicted for perjury; and the preamble to the 29th section of the 5 Geo. 2. c. 30. states the reason for the enactment: "And whereas many abuses have been committed by pretended creditors of bankrupts, be it enacted," &c.

By the 46th section of the new bankrupt act, 6 Geo. 4. c. 16. directions are given as to proofs by creditors; and by section 99 it is enacted, amongst other things, "that

that all and every sum and sums of money which shall be forfeited by force of this present act, shall be sued for and recovered by the said creditors only, or any of them that will sue for the same, by action of debt, bill, plaint, or information in any of the King's Majesty's Courts of Record; and the sum or sums of money so recovered, the charges of suit being deducted, shall be distributed and divided towards the payment of the said creditors of the bankrupt."

(a) And by the 5 Geo. 2. c. 3. s. 29. it was enacted, "And whereas many abuses have been committed by pretended creditors of bankrupts, be it enacted by the authority aforesaid, that if any person at any time hereafter shall, before the acting commissioners in any commission of bankrupt, or by affidavit or affirmation exhibited to them, swear or depose, or being of the people

called Quakers, affirm, that any sum of money is due to him or her from any bankrupt or bankrupts, which sum of money is not really due or owing, or shall swear or affirm that more is due than is really due or owing, knowing the same to be not due or owing, and that such oath or affirmation is false and untrue, and being thereof convicted by indictment or information, such person shall suffer the pains and penalties inflicted by the several statutes made and now in force against wilful perjury, and shall moreover be liable to pay double the sum so sworn or affirmed to be due or owing as aforesaid, to be recovered and levied as other penalties and forfeitures are upon penal statutes, after conviction, to be levied and recovered; and such double sum shall be equally divided among all the creditors seeking relief under the said commission."

any bankrupt or other person who shall, in any examination before the commissioners, or in any affidavit or deposition authorised or directed by the present or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury."

1828.

—
Ex parte
STRANGE
and another.
In the matter
of
ALLMOND.

In the present case, the assignees were convinced that the debts proved were proved by perjury and conspiracy, but not being willing to act upon their own opinions, they called a meeting of creditors, who sanctioned the prosecution which was advised by an eminent counsel. A question involving the same principle was agitated in August last, before the Lord Chancellor, who decided that the petitioning creditor was entitled to the costs incurred by him in an unsuccessful attempt to apprehend one of the bankrupts. (a) This case, although shortly reported, was argued at considerable length; and it was determined by the Lord Chancellor, that the costs were reasonably incurred in giving efficacy to the administration of the law, and ordered them to be allowed.

The question is, whether assignees, who, in the discharge of their duty, think that an indictment ought to be preferred against a person who has proved by perjury, and whose opinion is confirmed by the creditors and advised by counsel, are, upon a verdict of not guilty, personally to pay the costs of the prosecution. If this be the rule, it is scarcely necessary to say that such indictments will seldom be advised by any gentleman at the bar; that they will be reluctantly prosecuted by creditors; and that the offence may, consequently, be committed with impunity.

(a) *Ex parte De Tastet*, 2 Gl. & Jam. 405.

1898.

The VICE-CHANCELLOR :—

Ex parte
STRANGE
and another.
In the matter
of
ALLMOND.

In the case of *ex parte De Tastet*, the bankrupt's estate might have derived advantage from the appearance of the bankrupt, but in the present case what advantage could it derive? The debt, if proved by perjury, might have been expunged. I think, therefore, that the costs ought not to be allowed.

Mr. *Montagu* said, that it was not pecuniary advantage, but the punishment of offenders, which was the motive for criminal prosecutions; and that upon indictments for felony and conspiracy, where no pecuniary advantage could result to the estate, the assignees, whether they succeeded or failed, were never personally liable for the costs.

The VICE-CHANCELLOR observed, that if any precedents to this effect could be produced, the subject might be again mentioned.

On a subsequent day Mr. *Montagu* stated to the Vice-Chancellor, that in the prosecution of *Page* (a) the costs were paid, as of course, out of the estate.

The VICE-CHANCELLOR :—

The case of *Page* was of the same nature as the case of *De Tastet*; it related to expences incurred in proceeding against the bankrupt, where attendance might have been productive of pecuniary advantage to the estate; but the present is a proceeding against parties where conviction could not augment the estate. My opinion, therefore, notwithstanding the case of *Page*, remains unaltered.

(a) See 1 *Brod. & Bing.* 308.

Mr. *Montagu* said, that as this would in effect render the clause in the statute nugatory, he would, with the Vice-Chancellor's permission, mention the subject to the Lord Chancellor; and His Honour having expressed his wish to that effect, the petition was this day brought under the consideration of his Lordship.

Mr. *Montagu* for the petition, restated what he had submitted to the Vice-Chancellor, and contended, that the extra costs came fairly under the description of "just allowances," which the assignees were authorized to retain by the 6 Geo. 4. c. 16. s. 106. (a)

1828.
—
Ex parte
STRANGE
and another.
In the matter
of
ALLMOND.

L. C.
WESTM.
HALL,
Trin. Term
June 15.

The LORD CHANCELLOR :—

In this case great caution appears to have been used. The creditors, at a special meeting assembled for the purpose, as I collect from the proceedings, directed the prosecution to be commenced and carried on by the assignees. It is clearly proper that such prosecutions should be instituted. There is no public prosecutor in this country to pursue offenders, and persons so charged would otherwise escape. I think, the expences come fairly under the description of "just allowances," authorised by the act to be made to the assignees out of the estate, and that the prayer of the petition should be granted.

Ordered accordingly.

(a) By the 6 Geo. 4. c. 16. counts; and in such accounts the s. 106. it is enacted as follows: said assignees shall be allowed to retain all such money as they shall have expended in suing out the said assignees upon oath, and prosecuting such commission, and all other just allowances."

V. C.
LINC. INN,
July 7,
1828.

Where a commission had issued in 1815, and it was stated in the petition that a final dividend had been advertised in June 1827, the bankrupt's allowance was ordered to be paid, although it was admitted at the bar that there was still some reversionary property, but of small amount, to be realized.

Ex parte DAVIS. — In the matter of BARLEE. (a)

THIS was a petition for the bankrupt's allowance of 5*l.* per cent., and stated that the commission issued in October 1815; that the debts proved amounted to 4,000*l.* and upwards; that a first dividend of 2*s.* in the pound was declared on the 29th of March 1817, a second dividend of 7*s.* on the 6th of June 1818, and a final dividend of 1*s.* 9*d.* on the 29th of June 1827; and that the petitioner obtained his certificate on the 3d of December 1818.

It was admitted, however, at the bar, that the last dividend had not been a final dividend; and that there was still some reversionary property, but of small amount, to be realized.

Mr. *Wakefield* for the petition: —

The bankrupt having obtained his certificate, and the net produce of his estate having paid the creditors who proved 10*s.* 9*d.* in the pound, he is entitled to the allowance of 5*l.* per cent. directed by the 6 Geo. 4. c. 16. s. 128.; and the case of *ex parte* Stiles, 1 *Atk.* 208, ought not, under the circumstances, to be considered as an authority against this application.

Mr. *Hinde* for the assignees.

The Vice-Chancellor made the order without costs.

July 18.

His Honour having desired that this petition should be mentioned again, in consequence of some doubt

(a) See *ex parte* Minchin, *post*, page 135.

expressed at the bankrupt office respecting the practice : —

1828.

Mr. Wakefield submitted to the Court, that the case of *ex parte Stiles* must be considered as containing rather a dictum (a) than a decision of Lord Hardwicke on this point, as the objection urged was the deficiency of the separate estate, which had not paid 2s. 6d. in the pound. (b) He also cited *ex parte Calcot*, 1 *Atk.* 209, and 3 *Atk.* 814; *ex parte Safford*, 2 *Gl. & J.* 128; and the note to the latter case, respecting *ex parte Calcot*.

Ex parte
DAVIS.
In the matter
of
BARLEE.

The VICE-CHANCELLOR :—

In *ex parte Stiles* Lord Hardwicke referred to the time which had elapsed as being too short. From the note to *ex parte Safford*, it appears to me that a final dividend had not been made when the allowance was ordered in *ex parte Calcot*. The language of the act is, “ that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed four hundred pounds.”

It is the fault of the parties if they do not come to prove, sufficient time being afforded them. What was

(a) But see the reasons assigned by Lord Hardwicke for his judgment in this case, 1 *Atk.* 308. See also *ex parte Powell*, 1 *Med.* 70. Vice-Chancellor (Sir John Leach) that a sufficient dividend must be paid on the joint and the separate estate to entitle the party to the allowance under the 6 Geo. 4.

(b) In *ex parte Goodall*, 2 *Gl. & J.* 282, it was decided by the c. 16. s. 128.

1828.

Ex parte
DAVIS.
In the matter
of
BARLEE.

done in *ex parte Safford* seems to me an authority for this order. (a)

Order confirmed. (b)

(a) In *ex parte Safford* the dividend was advertised as a first and final dividend. See Gazette for 1826, page 1268.

(b) Mr. Bell, in his Commentaries on the Laws of Scotland, vol. ii. page 462. (4th ed.) has the following observations on the subject of bankrupt's allowances:

"There is a great difference between the English and the Scottish laws relative to the bankrupt's allowance.

"In England the allowance is aid to be 'an honour to the liberality of modern law,' having been first introduced in 1705 (1), and after successive alterations, restrictions, and amendments in temporary statutes, permanently established as part of the English system of bankrupt law in 1732. (2)

"It is given as a stock for subsistence till the bankrupt get again into a way of livelihood, and pre-supposes, both from this, and from the data for its ascertainment, the conclusion of the bankruptcy before it was granted.

"In Scotland the allowance is regulated differently; proceed-

ing on another principle altogether, and which has been thought, on the whole, a preferable arrangement. (3)

"It is not as a stock for future subsistence that the allowance is given, for every man is supposed capable of supporting himself when he is free to exert his industry for that purpose; but it is as subsistence money while the creditors require his aid, or have him entirely at their call, so as to prevent his turning his exertions to his own benefit."

Under the old statutes, a bankrupt, in England, was not entitled to any maintenance out of his effects during his examination; *Thompson v. Council*, 1 T. R. 157; but by the 6 Geo. 4. c. 16. s. 114. passed since the publication of Mr. Bell's treatise, the commissioners, before the choice of assignees, and the assignees afterwards, with the approbation of the commissioners, are authorised to make such allowance to the bankrupt out of his estate as shall be necessary for the support of himself and family, until he shall have passed

(1) 4 Anne, c. 17. s. 7.

(3) 54 Geo. 3. s. 137. s. 63.

(2) 5 Geo. 2. c. 30. made perpetual by 37 Geo. c. 124.

Ex parte HALL and others. — In the matter of
MOTT.

V. C.
July 19,
1828.

THIS was a petition to substitute the debt of a creditor who had proved, for the debt of the two petitioning creditors upon which the commission had issued, the latter being considered insufficient to support the commission, as, instead of being a debt due to them alone, it was found to be due to them, together with two other persons with whom they were in partnership. (a)

The 6 Geo. 4. c. 16. & 18. is applicable to a case, not only of deficiency in the amount, but to any original defect in the nature of the petitioning creditor's debt.

Mr. Sugden and Mr. Pemberton for the petition.

Mr. Rose, for the assignees, appeared to consent.

his last examination; and by the 128th section of the same act, the allowance, in respect of the dividends from his estate, is increased to double the former amount.

These provisions, by providing for the subsistence of the bankrupt, remove any hardship that existed under the old statutes, in deferring until "the conclusion of the bankruptcy," the calculation and payment of the latter allowance.

In Scotland, the allowance, or more properly, "subsistence money," is limited so as in no case to exceed three guineas per week, and not, on the whole, to amount to more than five per cent. of the net produce of the estate.

"The allowance is refused

altogether when the bankrupt has not kept such books as may enable his creditors to obtain a distinct knowledge of his affairs.

"The allowance stops at the period assigned for the payment of the second dividend; that is to say, at the end of eighteen months from the date of the first deliverance, when the bankrupt may apply for his discharge, and so acquire full right to his future acquisitions." 2 *Bell's Commentaries*, p. 462.

(a) In *Buckland v. Newsum*, 1 *Taunt.* 477, it was decided that a commission cannot be supported on the petition of one of two partners to whom a joint debt is due on bond.

1828. Mr. *Horne* and Mr. *Montagu contra* :—

Ex parte
HALL
and others.
In the matter
of
MOTT.

By the 18th section of 6 Geo. 4. c. 16. it is enacted, “that if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid.” But this was not intended virtually to supersede the 15th section of the act, which provides, “that no such commission shall be issued, unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to one hundred pounds or upwards, or unless the debt of two creditors so petitioning shall amount to one hundred and fifty pounds or upwards, or unless the debt of three or more creditors so petitioning shall amount to two hundred pounds and upwards.” It was merely intended by section 18 that the Court should be enabled to exercise a discretion in cases where the commission had issued upon a debt insufficient in amount, which the creditor, at the time the commission issued, supposed to be sufficient.

Previously to the *temporary* act of the 5 Ann. c. 22. and the 5 Geo. 2. c. 30. s. 23. there was no legal necessity for any petitioning creditor's debt.

It was not expressly required by any of the previous statutes (a); and in *Smith v. Blackham*, 1 Lord Ray-

(a) In the 34 & 35 Hen. 8. every complaint made to them in c. 4. s. 1. the words are, “upon writing by any parties grieved ;

mond, 724, it is said to have been ruled by Chief Justice *Treby*, that there was not any necessity to prove a petitioning creditor's debt, although the Lord Chancellor had, for caution, been in the habit of requiring proof that the bankrupt was indebted in 100*l.* before he granted the commission. (a)

1828.
—
Ex parte
HALL
and others.
In the matter
of
MORT.

The necessity of such caution, and the wisdom of the legislative provision, cannot be doubted; as, without it, any trader might be involved in bankruptcy by the malevolence of an enemy, or the rapacity of a rival in trade. Of this there have been frequent instances, even although the person was obliged to swear that he was a creditor for 100*l.* (b) The enactment must, therefore, have originated in the necessity of preventing evils which would otherwise arise; the evil of perverting a law, intended for the benefit of debtor and creditor, to the purposes of fraud and malice.

It cannot, therefore, be contended, that section 18 is intended to be a virtual repeal of section 15, and that a

and the words are more general in the statute 15 Eliz. c. 7. s. 2. "upon every complaint made to him in writing."

(a) The statute 5 Ann. c. 22. first regulated the *amount* of the petitioning creditor's debt, in the same manner as at present required by the 6 Geo. 4. c. 16.; but it was a *temporary act*, passed only for two years and "until the end of the next session of parliament." Its provisions, in this respect, were not revived until the passing of the 5 Geo. 2. c. 36. s. 23.; but it seems previously to have been the practice

to require an affidavit that the bankrupt was indebted to the petitioner and other creditors to the amount of 100*l.* See the form of such an affidavit, cited from Serjeant *Goodinge*, (who wrote some years before the statute of 5 Ann. c. 22.), in the 1st *Christian's* B. L. 206. See also 4 *Evans' Statutes*, 372, n. (1); and 596, n. (46), and 1st *Christian's* B. L. 72. and notes.

(b) *Ex parte Mackie*, 1807; *ex parte Oldfield*, 1828; *ex parte Charlton*, 1828; *ex parte Dignum*, 1809.

1836:

—
Ex parte
 HALL
 and others.
 In the matter
 of
 MORRIS.

creditor is to apply, as a matter of course, to have his debt substituted.

The words of section 12, which gives the Lord Chancellor authority to issue a commission, are, "that the Lord Chancellor shall have power, upon petition made to him, in writing, against any trader having committed an act of bankruptcy, by *any creditor or creditors* of such trader." And in section 18 the words are, "the debt or debts of the petitioning creditor or creditors." In the present case, the debt upon which the commission issued was not insufficient in amount, but was not, in fact, any debt at all; and even if the word *sufficient* be construed to extend to a debt void at law, this is a case not attended with such favourable circumstances as to call for the interposition of the Court. But whatever were the circumstances, they are not stated in the petition, so as to enable the Court to exercise any discretion upon the subject. It is incumbent on the creditor to shew, on the record, what the alleged debt was on which the commission issued, and why, and under what circumstances it was bad. Between the two extremes, of a commission maliciously procured by means of corrupt perjury, upon the application of a person who knows that he has no demand, and a commission innocently procured by a person who erroneously supposes that he has a just debt of sufficient amount, the cases will be susceptible of great variety: the present petition does not state any particulars, but merely that the original debt was not sufficient, and that the present debt was not anterior, without shewing why it was insufficient, or the date and circumstances of the debt sought to be substituted. The Court, therefore, is without the information which is necessary to enable it to decide whether it ought or ought not to interfere.

In strictness, application should have been made to the commissioners to expunge the debt of the petitioning creditor, before the parties came here to have their own substituted. This was the opinion of Sir *John Leach*, in *ex parte Chappell*, 2 Gl. & J. 131: but this objection we consent to waive.

1828.

Ex parte
HALL
and others.
In the matter
of
Morr.

The VICE-CHANCELLOR:—

My opinion is, that the 18th section of the 6 Geo. 4. c. 16. is applicable to a case, not only of deficiency in the amount, but to any original defect in the nature of the debt of the petitioning creditor, upon which the commission issued. The prayer of the petition to substitute must, therefore, be granted.

Ordered accordingly. (a)

(a) The order was as follows: major part of them, being satisfied that the debt proved thereunder by the said petitioners *John Hall, Thomas West, and John Hamlin Borrer*, or so much thereof as is sufficient to support the said commission of bankrupt, was incurred not anterior to the debt of the said *Thomas Palmer* and *Richard Green*, the petitioning creditors under the said commission, and is an existing and sufficient debt to support the commission, that the said commission of bankrupt, so awarded and issued against the said bankrupt, as in the said petition is mentioned, be proceeded in; and I do hereby refer it to the said commissioners to make the said inquiry accordingly. And I do

“ Now, upon hearing the said petition, and the affidavits filed in support thereof and in opposition thereto, and the affidavit of *Thomas Palmer*, filed 1st August 1827, read, and what was alleged by Mr. *Sugden* and Mr. *Pemberton* of counsel for the said petitioners, and by Mr. *Rose* of counsel for the said petitioning creditors and for the assignees under the said commission, who severally appeared and consented thereto, and by Mr. *Horne* and Mr. *Montagu* of counsel for the said bankrupt, I do order, upon the commissioners named in the said commission of bankrupt awarded and issued against the said *William Radley Mott*, or the

V. C.
LINC. INN,
Aug. 11, 12,
1828.

Under 6 Geo. 4.
c. 16. s. 127.
the assignees
under a second
commission,
where the bank-
rupt has not
paid 15s. in the
pound, take,
from the date of
the assignment,
a present vested
interest, by
operation of
law, in all fu-
ture estate
acquired by the
bankrupt.

A bankrupt,
under such cir-
cumstances,
although he has
obtained his
certificate under
the second com-
mission, cannot,
as a petitioning
creditor, issue a
commission of
bankrupt.

On a petition to
substitute under
6 Geo. 4. c. 16.
s. 18. although
a previous ap-
plication to the
commissioners
be required, an
order by them
to expunge the
petitioning cre-
ditor's debt is
not absolutely
necessary.

Ex parte ROBINSON. — In the matter of FREER.

THE petition stated, that this commission had issued upon the petition of *Reynolds*; that *Reynolds* had been twice a bankrupt; and that, although he had obtained his certificate under both commissions, there had not been any dividend under the second commission; that the petitioner had proved a debt of 250*l.* under the commission against *Freer*, not anterior to the debt of *Reynolds*; and that he had applied to the commissioners to certify that the debt of *Reynolds* was insufficient to support the commission, but that they were divided in opinion, and, being divided, one of them declined to sign such certificate; that an action had been commenced against the assignees, and they were apprehensive that the debt of *Reynolds* would not support the commission. The petition prayed that the petitioner's debt might be substituted.

Mr. *Rose* and Mr. *Swanston*, for the petition, referred to 6 Geo. 4. c. 16. s. 18., and *ex parte Hall in re Mott (a)*, recently decided.

Mr. *Montagu*, for *Reynolds*, the petitioning creditor, and for the bankrupt:—

This case is of considerable importance: and the questions are, first, whether the debt be insufficient; and,

order, that if the said commis-
sioners shall find in favour of
such debt, that they do enter,
upon the proceedings had and
taken under the said commission,
a declaration of such finding.
And I do further order, that the
costs of the said petitioners and

respondents, of and occasioned
by this application, be paid out
of the said bankrupt's estate;
such costs to be taxed by the
Master of the Court of Chancery
in rotation, if the parties differ
about the same."

(a) *Ante*, page 39.

secondly, whether, supposing it to be insufficient, the petitioner be entitled, as a matter of course, to this right of substitution.

1828.

Ex parte
ROBINSON.
In the matter
of
FAKER.

The words in the 6 Geo. 4. c. 16. s. 18, in pursuance of which clause this application is made, are, "if the debt of the petitioning creditor be found insufficient;" but the debt is not insufficient. The supposition, that a certificated bankrupt, under a second commission, cannot be a petitioning creditor, is erroneous. An uncertificated bankrupt, under a first commission, may maintain an action either of contract or tort against any person, except his assignees (a); and, being able to maintain an action, he may, subject to the same qualification, petition for a commission of bankruptcy. *Ex parte Cartwright, 2 Rose, 230.*

By sec. 127 (b) of the same act, a certificated bankrupt under a second commission, who does not pay 15s. in the pound, is placed in the same situation as an uncer-

(a) *Fowler v. Down*, 1 B. & P. 44.; *Webb v. Fox*, 7 Term. Rep. 391; *Cumming v. Roebuck*, 1 Holt, 172; *Clarke v. Calvert*, 3 Moore, 96; *Nias v. Adamson*, 3 B. & A. 225. See, for all the cases, 1st, where the assignees do not interfere, and 2d, where they do interfere, *Montagu's Annual Digest* for 1820, note v. p. 37.

(b) The words of the 127th section are: "That if any person shall have been so discharged by such certificate as aforesaid, or who shall have compounded with

his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the

1828.

Ex parte
ROBINSON.
In the matter
of
FRANK.

licated bankrupt under a first commission; and may, therefore, upon the same principle, issue a commission.

The words in section 18 are, "if the debt is found insufficient." This finding is a condition precedent to the application to this Court, *ex parte Chappell*, 2 G. & J. 181; but it has not been so found, and this is only an experimental petition, in the nature of a bill *quia times*, from a fear that it should be found insufficient.

It is now beginning to be assumed, as a matter of course, that a commission issued upon an improper affidavit may be supported by the substitution of a new petitioning creditor's debt; a question which is, in substance, whether there be any necessity for a petitioning creditor's debt to support a commission, or whether sec. 18 (a) may not be considered as a virtual repeal of sec. 15. (b) If this had been the intention of the legislature, sec. 15 would never have been enacted; but it was not the intention, for in England, and in every country where the bankrupt law has the semblance of science, a petitioning creditor's debt is requisite before a commission can be obtained. It is required by the law of Scotland (c),

wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission."

(a) *Ante*, page 40.

(b) *Ante*, page 40.

(c) By the Scotch bankrupt

act, 54 G. 3. c. 157. s. 15. it is enacted as follows: "It shall be lawful for any creditor of the said person whose debt shall amount to the sum of 100l. sterling, or any two creditors whose debts shall amount to the sum of 150l. sterling, or any three or more creditors whose debts shall amount to the sum of 200l. sterling or upwards, whether such debts are liquidated by formal

of Holland, of France (a), and even by the Mohammedan laws, (b) From such a concurrence of similar legislation, it would appear that the law must have originated in the necessity of preventing the operation of some evil

1829.

Ex parte
Robinson.
In the matter
of
FARRER

vouchers or stand upon open account, at any time within four calendar months of the last step of the said diligence, to apply, by summary petition to the Court of Session, for sequestration of the said debtor's estate, heritable and moveable, real and personal."

Upon this clause, Mr. Bell (3d Comment, p. 560.) says, "the debt on which the petition is grounded must be either a debt presently due, or due at a certain future time, not contingent. But if the debt be of such a nature that the amount of it is not yet ascertained, it will not ground a petition for sequestration."

(a) 34. Si le commerçant qui est en état faillite, n'en fait point sa déclaration au greffe du tribunal de commerce, ses créanciers, comme nous avons eu déjà l'occasion de le faire observer, ont le droit de requérir, en le prouvant, qu'il soit néanmoins déclaré en faillite par le tribunal. Chaque créancier a un intérêt incontestable à faire constater un fait qui influe si particulièrement sur sa créance. Ainsi, tout créancier de dettes commerciales peut user de cette faculté. On sent qu'il n'est pas besoin pour cela que la dette soit échue, parce

que le porteur de cette créance a un intérêt pressant à ce que l'actif du failli ne soit pas anéanti, par des remboursements et des transactions frauduleuses. Nous sommes loin de penser avec M. Pardessus, que tout créancier, sans distinction, si la dette est ou n'est pas commerciale, puisse provoquer la déclaration de faillite, &c. *Usages des Reunions et Banqueroutiers*, par M. M. Boulay-Paty, vol. i. p. 48.

(b) *Digest of Mohammedan Law*, book iv. chap. 5., in the library at the East India House, and in the University library at Cambridge: "A person who owes debts, which his property is insufficient to discharge, is interdicted or prohibited from using that property which he may still possess.

" This interdiction cannot be established except upon four conditions:

" 1st, That his debts shall be proved before the judge.

" 2dly, That they shall be actually due and eligible at the time.

" 3dly, That the property shall fall short of their amount.

" 4thly, That his creditors, or a portion of them, shall require the interdiction to be made."

1828.

Ex parte
ROBINSON.
 In the matter
 of
FAIRER.

attendant upon the unchecked power of issuing a commission — an evil which was discovered in this country, where, originally, although the necessity of a petitioning creditor's debt was not required by statute, the evils of such general permission induced the Lord Chancellor to require that, as the foundation of a commission, the petition should be presented by a creditor to the amount of 100*l.* (a) With this state of the law in so many countries; with the enactment before us, contained in section 15; with a knowledge of the evils of hasty swearing, of which, in bankruptcy, Lord *Eldon* so frequently complained (b); is it to be contended that any person, upon swearing to a debt at random, may petition for a commission, and then, after the trader has been ruined by his rashness, that the commission may be supported by another creditor, who, but for those hasty proceedings, never would have attempted to maintain a commission?

That it was not the intention of the legislature virtually to repeal section 15 by section 18 appears to be clear. What then did the legislature contemplate by section 18? It did not, as against the bankrupt, intend, that a commission, invalid in its concoction, and by which he is ruined, should afterwards be rendered valid against him; but that, after the commission had been in operation for some time, and the bankrupt, perhaps certificated, or acquiescing, the

(a) See *ex parte Hall*, ante, act of bankruptcy;" and in *ex parte Parton*, 15 *Ves.* 462, Lord

(b) In *ex parte Leicester*, 6 *Ves.* 430, Lord *Eldon* observed, that business of bankruptcy proves, that the affidavit made upon striking a docket is rather too rashly sworn in many cases." See afterwards whether there was an also *Wydown's Case*, 14 *Ves.* 80.

assignees should not be deprived, in an action against a debtor, of the power to enforce payment, because the debt upon which the commission issued happened not to amount to 100*l*. The words, therefore, in the statute, are, "found insufficient." In the present case it has not been found insufficient, which, according to the decision of Sir *John Leach*, in *ex parte Chappell*, 2 *Gl. & J.* 131, is a condition precedent to the application to this Court. It clearly is not insufficient in amount, and, for the reasons already stated, it is not insufficient in law.

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Mr. *Rose* in reply ;—

The whole of Mr. *Montagu's* reasoning, with respect to the supposed analogy between an uncertificated bankrupt under a first commission, and a certificated bankrupt under a second commission, is erroneous, as in *Read v. Sowerby*, 3 *M. & S.* 78, it was decided, that after the proof under a second commission, the creditor cannot proceed at law. The concluding words of the 127th section of the 6 *Geo. 4. c. 16.*, which are new, are decisive of this part of the question, and the 63d section of the act is to the same effect. As to the second point, the act would be inoperative if it were to apply only to a debt insufficient in amount, and not to an insufficient legal debt.

The VICE-CHANCELLOR :—

By section 127 it is enacted, that whenever there happens to be an acquisition of future estate, it vests absolutely, and *ab initio*, in the assignees. They take a present vested interest from the date of the assignment by operation of law ; the effect of the statute being to take all property out of the bankrupt, and to vest it

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Ex parte
ROBINSON.
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of
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absolutely in his assignees ; and, as it cannot vest both in the bankrupt and in his assignees, the rights supposed to be in the bankrupt do not exist.

The only remaining question is, whether, when a petition is presented to substitute, it is necessary, according to the decision in *ex parte Chapple*, that the petitioner should make a previous application to the commissioners to have the debt expunged upon which the commission issued. This question, in the present case, can hardly be said to arise, as the parties have been before the commissioners, and they were divided in opinion. It does not appear to me to be necessary, that there should be an absolute finding by the commissioners to warrant the interposition of this Court. It is sufficient to have a reference to them. It cannot be the law, that the debt should be first expunged, for it may turn out that the debt has not been proved at all.

Upon the whole, it appears to me, that it is a proper case for a substitution.

Let the costs of the petitioner be paid out of the estate, but no other costs.

Ordered accordingly.



Ex parte CLAPHAM and others.—In the matter of
GRAHAM.

V. C.
LINC. INN,
August 7,
1828.

THE attestation to this petition was in the following form: "Subscribed by the said *J. Clapham, B. Carr,* and *W. Derbyshire*, the 14th day of October 1821, in the presence of *T. Hurle*, of the city of York, solicitor to the petitioners."

Unless the person attesting the signatures of the petitioners, under the general order of August 1809, be the solicitor actually presenting the petition, he should state himself in the attestation to be the attorney, solicitor, or agent of the party signing in the matter of the petition.

The petition was indorsed "*Battye* and Co., for *Hurle*."

Mr. *Montagu* objected that this attestation was not a sufficient compliance with the general order of the 12th August 1809, because it appeared that *Battye* and Co. were the solicitors who presented the petition, as the agents in London of *Hurle*; and he, therefore, should have described himself, in the attestation, as solicitor or agent of the petitioners, "*in the matter of the petition.*" *Ex parte Wilkinson*, 1 Gl. & J. 353 and *ex parte Champneys*, 1 Gl. & J. 354.

Mr. *Horne* and Mr. *Rose contra*.

The VICE-CHANCELLOR said, that by the last clause of the general order, and according to the decision in *ex parte Wilkinson*, he was bound to determine that the attestation was insufficient, and that the words, "in the matter of the petition," should have been added.

V. C. *Ex parte* TURNER and another. — In the matter of
 LINC. INN, EVANS.
August 7,
 1828.

Assignees of a bankrupt not responsible for a loss sustained in the disposal of the bankrupt's effects, where, under the circumstances, it could be inferred that there had been no blameable negligence in their conduct.

THIS was a petition of the assignees under a commission against *Evans*, praying for the discharge of an order made by the Commissioners, that they should divide the sum of 1,220*l.* 11*s.* 5*d.* amongst the creditors who had proved. There was a cross-petition of creditors, to enforce payment of their proportion under the order. It appeared, that in the month of January 1826 the bankrupt, who carried on the business of a linen draper, executed a deed of assignment of his personal estate and effects to trustees, for the benefit of his creditors. By direction of these trustees, the stock in trade and furniture were placed for sale in the hands of *Tarrant* and *Carter*, who were auctioneers and accountants; but before any sale was effected, a commission of bankrupt issued against *Evans*, bearing date the 26th of January 1826, under which commission the petitioners were chosen assignees. The petitioners soon after communicated with *Tarrant* and *Carter*, and in pursuance of their advice, the bankrupt's stock in trade was disposed of by public auction, on the 9th and 10th of March 1826, and his household furniture on the 3d April following. Shortly after the last sale *Turner* applied to *Tarrant* and *Carter*, on behalf of himself and his co-assignee, and was informed that some lots which had not been cleared by the purchasers were to be resold in a few days, when they would make up an account of all the sales, and pay over the money to the bankers under the commission. *Turner* was also informed, on this occasion, that *Tarrant* and *Carter* had sold the stock at a credit of two months, as was their usual custom, for the purpose of obtaining better prices, but that such credit would expire in a few days.

The petitioners expressed much dissatisfaction with the conduct of *Tarrant* and *Carter*, in selling on credit without their authority; but confiding in the promises of payment that were made them, they caused a meeting for a dividend to be advertised for the 13th of June following. Between the end of April and the end of May, they frequently, but unsuccessfully, renewed their applications to *Tarrant* and *Carter*, for the delivery of the accounts, and payment of the produce of the sales. On the 27th of May, *Tarrant* and *Carter* stopped payment, and on the 3d of June following, a commission of bankrupt issued against them. On the 13th of June, the commissioners, under the commission against *Evans*, met in pursuance of the advertisement for a dividend, when it appeared that the petitioners, the assignees, had no assets in their hands. The commissioners, however, being desirous that the Court should decide whether the petitioners ought not be charged, under the circumstances above stated, for the loss arising from the failure of *Tarrant* and *Carter*, made an order for a dividend of the sum of 1,220*l.* 11*s.* 5*d.*, the amount which appeared to have been received by *Tarrant* and *Carter*, and to be due from their estate.

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On behalf of the creditors, affidavits of various auctioneers were filed, stating it to be the “almost invariable custom” of assignees to apply for the accounts and net proceeds of any sale of bankrupt’s property, within a week or ten days from the time of sale.

Mr. *Sugden* and Mr. *Montagu* for the petition: —

The assignees found the property in the custody of *Tarrant* and *Carter*, and had no reason to doubt their responsibility or qualifications to effect an advantageous sale. No authority was given by them to dispose of the

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goods on credit. That was done without their consent or knowledge; and they exhibited throughout as much activity and vigilance as if they had been acting on their own account. These transactions were according to the ordinary course of business: they occurred during a time of great commercial difficulty; and it might have been reasonably considered more prudent to afford the auctioneers time to make their promised payments, than to resort at once to rigorous measures, and thus involve the estate in litigation.

If assignees are to be charged under circumstances like the present, no person will be found to undertake so hazardous a trust. But the case of *ex parte Belchier* and *ex parte Parsons*, *Amb.* 218, and more fully reported under the title of "*Belchier against Parsons*," 1 Lord *Kenyon's Reports*, 38, is a decisive authority. There an assignee of a bankrupt had employed a broker to sell a large quantity of tobacco by auction. The money was paid to the broker, and after remaining in his hands a few days he fell sick, and in about ten days after died insolvent. Lord *Hardwicke* determined, that the assignee had not been guilty of any blameable negligence, any "*crassa negligentia*," and was not, therefore, answerable for the loss; and observed, in the course of his judgment, that if it were once laid down as a rule in this Court, that assignees or trustees should be answerable, in all events, for the people they employ, no man in his senses would ever undertake those offices; that it was customary for brokers to receive the money, and that if a man of credit, the Court had always thought him the most proper person to receive it. In this case the assignees acted conformably to the common usage of mankind, and ought not to be charged with the loss.

Mr. Horne and Mr. Rolfe *contra* : —

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The great object of the bankrupt laws is to sell the goods of the bankrupt speedily, and for ready money, in order that there may be an early division of the estate amongst the creditors.

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Here we contend : 1st, That the assignees sold improperly on credit ; and, 2dly, That they did not use due diligence in recovering the money from the auctioneers after the sale.

As to the first point, it was the duty of the assignees to sell in the ordinary manner, and according to known rules. But these goods, instead of being sold by auction for ready money, according to the usual practice, were disposed of at a credit of two months. The auctioneers were the agents of the assignees, and the assignees are, therefore, responsible for their acts. It is impossible for the Court to sanction a sale by assignees on credit, without infringing the spirit of the bankrupt laws, and opening the door to collusion and fraud.

Secondly, it appears from the evidence to be customary for assignees of bankrupts' estates to apply to the auctioneers, a few days after the sale, for payment of the produce. The sale of the stock in trade, which was the most important sale, took place on the 9th and 10th of March ; and yet, instead of then applying to *Tarrant* and *Carter*, no application was in fact made until some days after the second sale, which took place on the 3d of April, nearly a month after the first sale. This is an instance of that "*crassa negligentia*" to which Lord *Hardwicke* refers in *ex parte Belchier*. In that case, the delay was only ten days ; but here, the greater part

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of the money having been left in the hands of the auctioneers, during the whole time that elapsed between the first and second sales, which was nearly a month, it cannot be said that due diligence was used.

Mr. Sugden in reply: —

The assignees only waited until the completion of the sales, according to the regular course, and they then applied for the accounts and payment of the produce. The real question for consideration is, what would have been the conduct of a man of business acting for himself, and wishing to act diligently? Unless assignees are required to do more than individuals are accustomed to do on their own account, this order must be discharged. (a)

The VICE-CHANCELLOR: —

It appears that, prior to the commission, the effects had been placed in the hands of *Tarrant* and *Carter*; and there can be no imputation on the assignees for continuing to employ them to sell by auction, which was the regular and proper course of proceeding.

The sale by these persons on credit was without the sanction or knowledge of the assignees, and from the terms of the conditions of sale, I should have considered that immediate payment was required from the purchasers.

The assignees do not seem to have had any just reason to doubt the responsibility of *Tarrant* and *Carter*; and even if they had, there was no immediate remedy, for they found the goods in their possession.

(a) See in *re Earl of Litchfield*, 1 Atk. 86.

I think that the assignees were not blameable for leaving the goods in the hands of these persons, and that no blameable negligence can fairly be imputed to them in their endeavours to recover the money after the sales. The order for a dividend must therefore be rescinded.

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Ex parte
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Ex parte WATKINS. — In the matter of WILLIAM SIKES, HENRY SIKES, and THOMAS WILKINSON.

V. C.
LINC. INN,
August 9,
1828.

WILLIAM SIKES, Henry Sikes, and Thomas Wilkinson, were in partnership as bankers. According to the established practice of the firm, and in order that sales might be readily made, when required, it was customary to transfer, into the name of one of the partners, all stock purchased by the house, as an investment for capital.

Under a joint commission, proof ordered by the joint against the separate estate of one partner, who had appropriated partnership stock without the privity or sanction of the other partners, and afterwards retained it, with their knowledge, but under circumstances, from which their subsequent approbation could not be inferred.

In October 1823, there was standing, in the separate name of *Henry Sikes*, in the books of the governor and company of the Bank of England, a sum of 20,000*l.* three per cent. consolidated bank annuities, which had been thus invested on account of, and was the property of the partnership.

On the 6th of October, *Henry Sikes* sold and transferred the above sum, and received the produce, amounting to 16,549*l.* 17*s.* 11*d.* Of this, he paid 8,318*l.* 2*s.* 11*d.* into the banking-house, on account of the partnership; and appropriated the remainder to his own use in the

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following manner: 3,788*l.* was applied by him to cover losses sustained by speculating on his own account in the funds, and 4,444*l.* 1*s.* was paid into the banking-house, to the credit of his private account. That account had been previously, and remained largely overdrawn.

In December 1825, a commission of bankrupt issued against *Wm. Sikes, Henry Sikes, and T. Wilkinson*; and upon the 24th March following, at a dividend meeting under the commission, a proof was tendered on behalf of the joint estate, against the separate estate of *Henry Sikes*, for the value of 10,000*l.* three per cent. consolidated bank annuities; but the commissioners not considering themselves at liberty to receive such proof, without an order from the Court, the present petition was presented, praying for the admission of the proof for the benefit of the joint estate.

On his examination before the commissioners, *Henry Sikes* admitted, that this application of the proceeds of the partnership funds was not under the authority, or with the consent or knowledge of his partners; that he had never so dealt with the partnership funds before; that he did not mention the transaction to his partners, because *Wilkinson* was absent from town from illness, and *William Sikes* did not attend to that department; but that he stated to *Wilkinson*, immediately on his return, a day or two afterwards, that he was in want of money, and had, therefore, taken 10,000*l.* consols, partnership stock, to his own use; that he had no reason to believe that the transaction ever met with the approbation either of *Wilkinson* or *William Sikes*. *Wilkinson*, being also examined before the commissioners, stated, that on his return to town, after an absence of a day or two,

occasioned by illness, *Henry Sikes* told him that he had sustained considerable loss, and that he had applied 10,000*l.* three per cents., belonging to the house, to his own use ; that he replied he was sorry to hear it, and that he must replace it as soon as he could ; that on one occasion, previous to charging *Henry Sikes* with the dividends, he asked him if he had replaced it, and hearing that he had not, expressed a hope that he would be able to do so speedily ; that he charged *Henry Sikes* with the dividends because he considered it necessary to get what he could—the interest if he could not get the principal ; that he never considered the transaction as a *bonâ fide* transaction of loan, or as one entitled to stand on that footing ; that the absence of the funds remained of necessity ; that he never sanctioned, confirmed, or approved the transaction, unless so far as receiving interest in the manner stated may be so considered ; that he never charged or received interest from any other motive or for any other reason than from being desirous to get what he could back ; that he did and does consider the transaction one in breach of faith to the partnership.

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In answer to the petition, an affidavit of *Henry Sikes* was filed, stating, amongst other things, that it had been very usual for the private accounts of the partners to be overdrawn ; that the partner so overdrawing did not require the previous consent of his other partners for so doing ; and that such overdrawings were considered as debts due to, and not as frauds on the partnership ; that from the 6th October 1823, to the time of the house stopping payment, the appropriation so made by him for his private accommodation was treated by him and his partners, in all respects, as a debt of 10,000*l.* consols due to the partnership from him ; that he was

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regularly debited with the dividends, half-yearly, on the amount so appropriated; that his partners did not, on any occasion, in his hearing, allude to such appropriation as fraudulent, or a breach of faith to the partnership, or in any other way than as a debt of stock; that no alterations were made in the dealings of the partners towards each other, by reason of such appropriation having been made; that he and his partners respectively continued to overdraw their accounts; and that he subsequently continued to have stock placed in his name, on account of the partnership, with the consent of his partners.

Mr. *Horne* and Mr. *Knight* for the petition : —

The question is, whether this transaction did not amount to a breach of duty, and fraud upon the partnership. The sum of 10,000*l.* consols was sold and appropriated improperly, and fraudulently in this sense, that it was applied by one partner to his separate use, under circumstances from which the law implies fraud. There can be no doubt that it was a breach of the partnership articles, and of the contract, express or implied, which existed between the parties. *Henry Sikes* had stock differences to discharge, and, to provide for them, he sold and appropriated to his own use a large sum of consols, which had been placed in his name for the more convenient use of the partnership. As against his partners this was clearly a breach of trust. The transaction commenced in fraud, and it only remains to be considered whether it ended in contract. Subsequent approbation, or even acquiescence, may be sufficient to establish contract; but here there was no acquiescence but such as was compulsory to avoid exposure, and to escape the greater evils to which the partnership might

have been thus subjected : in this respect the transaction speaks for itself.

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In *ex parte Harris*, reported in 1 *Rose* 129 and 437, and in 2 *Ves. & B.* 210, Lord *Eldon* is reported to have said, "Lord *Thurlow* (a), by 'fraud,' intended to express what he thought necessary to distinguish that from taking by contract, or loan, or without the express or implied authority of the other partner, and that such act would amount to fraud. "Upon this case," he adds, "I formerly expressed my opinion; and I now lay it down, that if in either the expressed or implied terms of an agreement for a partnership there is a prohibition of the act, and it is done without the knowledge, consent, privity, or subsequent approbation of the other partner before the bankruptcy, and to the intent to apply partnership funds to private purposes, that is *prima facie* a fraud upon the partnership."

Mr. *Bickersteth* and Mr. *Duckworth* for the respondents :—

There is no dispute about the principal facts. *Henry Sikes* had in his own name stock belonging to the firm. He sold and appropriated it to his own use, without the knowledge of any of his partners. This was, without doubt, an improper transaction; but the next day, or the day after, he communicated the circumstance to *Wilkinson*; and the question therefore arises, whether there was not subsequent acquiescence? Of this, the fact that *Henry Sikes* was debited half yearly with the dividends on the amount appropriated affords strong proof. This is acquiescence amounting to legal appro-

(a) *In re Lodge & Fendal*, 1 *Ves.* jun. 166.

1828. bation, not to moral approbation ; there is an obvious distinction between the two.

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of
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In *ex parte Harris*, Lord Eldon said (a), that "cases of this kind must be decided upon their particular circumstances, and that the conclusion of law, as to fraud, must depend upon the nature of those circumstances," amongst which subsequent acquiescence is certainly a material ingredient.

In *ex parte Smith*, 1 G. & J. 74, the Vice-Chancellor held, that "if a partner be intrusted with the management of the partnership concern, and he withdraw monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it." Here it is not pretended that there was any concealment of what had been done: there was nothing clandestine, for *Wilkinson* was told as soon as he returned to town. It is essential that these cases should be closely examined, for otherwise joint creditors may be enabled to defraud separate creditors to a great extent. But here it cannot be pretended that the joint estate has been damnified to the extent of the sum sought to be proved, for 4,444*l.* 1*s.* was paid by *Henry Sikes* into his private account, which was overdrawn, and therefore the overdrawing was diminished *pro tanto*.

The VICE-CHANCELLOR :—

It appears to me that there was nothing like acquiescence amounting to subsequent approbation, and

(a) 1 *Rose*, 439.

that under the circumstances the partners could not have acted otherwise than they did; they kept an account of the dividends that would have accrued due on the stock sold, and charged them to the debit of *Henry Sikes*. It is admitted that he did, in effect, sell out 10,000*l.* consols, of which part was brought into the house, and part applied out of it, to answer stock transactions; but inasmuch as he was charged with dividends on 10,000*l.* stock, it appears to me that the transaction was treated as a sale and appropriation to his separate use of that sum, and that the proof ought to be for the whole amount.

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of
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and others.

Ordered accordingly.

Ex parte BEST. — In the matter of FORTUNE.

V. C.
LINC. INN,
August 9,
1828.

THIS was the petition of a creditor, under an award, that the commission might be superseded, on the ground of improper delay. The commission issued on the 23d of May 1826, but no proceedings were taken, and it was not in fact opened until the 19th of March 1827.

Commission
issued 23d May
1826, and not
opened until
19th March
1827, superseded
on the ground
of improper
delay.

Mr. *Sugden* and Mr. *Montagu*, for the petition, contended that the delay was not accounted for, and relied upon *ex parte Lake*, 1 *Gl. & J.* 362, and Lord *Eldon's* judgment in that case.

Mr. *Rose* *contrd.*

The VICE-CHANCELLOR thought the case came within the principle of the decision in *ex parte Lake*.

Commission superseded.

V. C.
LINC. INN,
August 10,
1828.

Ex parte THOMAS.—In the matter of
TURBERVILLE.

Petition that a bankrupt be compelled to convey under 6 Geo. 4. c. 16. s. 78. refused, until he could have an opportunity of trying the validity of the commission.

A PETITION had been presented to compel the bankrupt to join in conveyances of his real estates to purchasers, according to the 6 Geo. 4. c. 16. s. 78.; but the Lord Chancellor refused to make the order, because, although nonsuited in one action, a second action, brought by the bankrupt, to contest the validity of the commission, was still pending. (a)

This was a second petition, praying to the same effect as the former, and stating, that on the 13th of March last the bankrupt was *non-prossed* in the second action, for not having proceeded therein, and that no subsequent action had been commenced by the bankrupt for the purpose of trying the validity of the commission.

Mr. Knight for the petition.

Mr. Pemberton, against it, said that all proceedings in the second action had been stayed until payment of the costs of the first action, which the bankrupt had no funds to discharge, and that he had been then *non-prossed* in the second action, for not proceeding, which the former order in fact restrained him from doing; but that he was still desirous to try the validity of the commission.

The VICE-CHANCELLOR ordered, under the circumstances, that the petition should stand over until next

(a) See the case reported 2 G. & J. 278.

Easter term, on the bankrupt's undertaking to bring another action against the assignees, to try the validity of the commission; and that, in the meantime, the assignees should be restrained from setting up as an objection, the nonpayment of the costs of the former actions.

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Ex parte
 THOMAS.
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 of
 TURBENVILLE.

Ex parte WISE.—In the matter of SIMON JACKAMAN.

V. C.
 LINC. INN,
 August 13,
 1828.

THIS was a petition of the assignee of the bankrupt's estate to reverse or vary an order, made on the petition of an equitable mortgagee, for the sale of certain premises to which it had been supposed that the bankrupt was entitled in fee simple; but of which it was subsequently discovered that he was, at the time of his bankruptcy, seised as tenant in tail under the will of his grandfather *Simon Jackaman*, the remainder in fee expectant on the said estate tail being by the same will vested in *Isaac Jackaman*, who had recently died without issue, leaving the bankrupt his only brother and heir at law.

Under 6 Geo. 4.
 c. 16. s. 65.
 the equitable
 mortgagee of a
 bankrupt tenant
 in tail is entitled
 to have his lien
 made good as
 against the fee
 simple of pre-
 mises of which
 the bankrupt
 was seised as
 tenant in tail.

It was alleged, by the petitioner, to be doubtful; first, whether by the 6 Geo. 4. c. 16. an equitable mortgagee of a tenant in tail, becoming bankrupt, is entitled to have his mortgage or lien made good as against the fee simple and inheritance of the premises of which the bankrupt was seised in tail; secondly, whether such premises are under the act vested in the assignee in fee simple, by virtue of the bargain and sale of the bank-

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rupt's real estate, so as to make the incumbrance or lien effective as against the fee simple; thirdly, whether a purchaser of the fee simple would not take paramount to the claim of the incumbrancer; and, fourthly, whether the assignee of the bankrupt would not take the purchase money wholly, or to some extent, discharged from any incumbrance or lien made by the bankrupt tenant in tail.

Mr. *Tinney* for the petition: —

The ground on which an equitable lien, created by a bankrupt tenant in tail, was held, before the late act, to attach on the estate, was, that the assignees who, by force of the statutes 21 James 1. c. 19. s. 12., and 5 Geo. 2. c. 30. s. 26., took a fee simple, took it subject to the bankrupt's contracts and engagements. (a) But under the 6 Geo. 4. c. 16. s. 65. the assignees do not take the estate at all, for it is the duty of the commissioners to sell the estate tail, and to convey to the purchasers. It passes, by force of the 65th section of that act, directly to the purchasers for valuable consideration, discharged of the entail. Although the commissioners, however, have power to convey the estate, it does not vest in them; and against them, therefore, the mortgagee can have no equity.

There is nothing in the act saying that the purchaser shall take subject to a contract of the bankrupt's, which contract clearly did not bind the estate beyond his own life; and nothing which says that the equitable mortgagee shall have a lien on the purchase money which he had not on the estate.

(a) *Edwards v. Applebee*, 2 Bro. C.C. 652; *Pye v. Daubux*, 3 Bro. C.C. 595.

Mr. *Barber*, *contra*, was stopped by the Court.

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The VICE-CHANCELLOR: —

Ex parte
Wise.
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JACKAMAN.

This case does not come before the Court as if a sale had been already made by the commissioners, and the estate conveyed to purchasers for valuable consideration, without notice of the equitable mortgage, and of the estate being affected by it. As a deposit of deeds has been held to amount to an equitable mortgage, which is, in fact, a right in equity to call for a legal mortgage, I think this order must be drawn up so that the commissioners may sell, subject to the equitable mortgage.

Ordered accordingly.



Ex parte SHEPARD. — In the matter of
SHEPARD.

V. C.
LINC. INN.
August 13,
1828.

THIS was a petition that the assignee should pay over to the bankrupt the surplus of his estate. The commission issued on the 16th June 1816. On the 29th August 1817 a dividend of 9*s.* in the pound was paid, and on the 20th June 1823 a further dividend of 11*s.*

The 132*d* sect. of the 6 Geo. 4. c. 16. as to the allowance of interest to simple contract creditors, is not retrospective.

By an order made on the 16th August 1824, it was directed that the commissioners should compute interest from the date of the commission, on all debts proved that carried interest, and that the assignees should pay

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the same out of the surplus. This was accordingly done; but the act of 6 Geo. 4. c. 16. having, in the meantime, come into operation, doubts were entertained by the assignee, whether, under the 132d section of that act, the simple contract creditors who had proved were not entitled to interest on their debts at the rate of 4l. per cent.

Mr. Montagu and Mr. Barber for the petition : —

Under the old act, as soon as all debts, including the interest of those entitled by law to carry interest, were discharged, the bankrupt became entitled to any surplus; but by the 132d section of the new act, the bankrupt is not to receive the surplus until all creditors who have proved under the commission shall have received interest upon their debts. This clause, however, cannot be construed as having a retrospective effect, because by the 135th section it is enacted "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted."

Mr. B. R. Anderdon contra : —

By the 13 Eliz. c. 7. s. 4. (the words of which are adopted in the last act,) the bankrupt was to request payment of the surplus from his assignees; but as no request was actually made before the passing of the

6 Geo. 4. c. 16., no interest vested in the bankrupt, and the surplus became liable to the demands of the simple contract creditors under the regulations of that act.

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Besides, the words in the 135th section, "except as herein is specifically enacted," shew that this section was not intended to limit the operation of the 132d section, which must, therefore, be considered as retrospective in its operation.

Mr. *Montagu* in reply : —

The right vests in the bankrupt the moment the duty is performed. As soon as the debts are paid, the assignees are mere trustees for the bankrupt; and a previous request is, therefore, immaterial. (a)

The VICE-CHANCELLOR : —

Considering the words of the 132d and 135th sections together, I cannot think it was intended that the former should be retrospective. The words in the 135th section are, "affect or lessen any right, claim, demand," &c. Now the right against the bankrupt would be affected, if the right were increased. I think the simple contract creditors are not entitled to interest, and that the surplus must be paid to the bankrupt.

Ordered accordingly.

(a) The bankrupt laws take assignees are mere trustees for the property out of the bankrupt, the bankrupt. Per Sir *William Grant*, M.R. *Charman v. Charman*, 14 *Ves.* 585.
only for the purpose of paying his creditors; and from the moment that the debts are paid, the

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Where upon an action on a contract there was a verdict for the plaintiff at Nisi Prius, subject to a reference before the bankruptcy (by which it was directed that the costs of the action should abide the event of the award), and the award was made in favor of the plaintiff after the bankruptcy, the costs were held to be proveable under the commission.

IN Hilary Term 1826, the petitioners commenced an action of assumpsit against *Fisher*, for the sum of 848*l.* for the use and occupation of a farm and premises. The cause came on for trial at the Lent assizes for Monmouth, in March 1826, when a verdict for a nominal sum was taken by consent, subject to a reference. By the order of reference, bearing date the 25th of March 1826, it was referred to two arbitrators, to ascertain the sum to be paid by *Fisher* for the rent, and to determine other matters in difference between the parties, as to the repairs of certain premises; it was further ordered, that the costs of the action should abide the event of the award, and be paid on the 24th of June then next ensuing; and that the costs of the reference should be in the discretion of the arbitrators.

On the 8th of April 1826, *Fisher* committed an act of bankruptcy, and on the 22d a commission issued against him, upon which he was afterwards duly found a bankrupt.

On the 28th of the same month, the arbitrators made their award, determining 624*l.* to be due to the petitioners for rent, and 70*l.* to the bankrupt for repairs, and directing that the petitioners should be at liberty forthwith to enter a verdict for 554*l.* 18*s.* 10*d.*; and that, of the costs of the reference and award, one moiety should be paid by the petitioners, and the other moiety by the bankrupt. The arbitrators further directed, that if the bankrupt should make default in payment of the

said sum of 554*l.* 18*s.* 10*d.* as therein stated, viz. the sum of 242*l.* 9*s.* 5*d.*, being the first instalment, (after deducting the said sum of 70*l.* for repairs,) on the second day of May then next; the costs of the action on the 24th day of June then next; and the sum of 312*l.* 9*s.* 5*d.*, together with his moiety of the costs of the reference and award, on the 2d day of November then next; it should be lawful for the petitioners, from and after any such default as aforesaid, to enter up final judgment against the bankrupt, for the whole or either of the said several sums of money as the same might then remain due, and to levy the amount thereof in the usual way, by process of the Court of King's Bench. On the 13th May 1826, the bankruptcy was advertized in the Gazette; and the bankrupt having made default in payment of all the sums awarded, the costs of the petitioners were taxed at 73*l.* 11*s.* 2*d.*, and final judgment was entered up for 554*l.* 18*s.* 10*d.* damages, and 73*l.* 11*s.* 2*d.* costs, amounting, together, to 628*l.* 10*s.*, which sum the petitioners applied to prove under the commission; but the commissioners having refused to admit any proof for the said sum of 73*l.* 11*s.* 2*d.* costs, this petition was presented, praying for leave to prove the same.

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Mr. Sugden and Mr. Montagu for the petition :—

The question is simply whether, when there is a verdict, subject to a reference, before the bankruptcy, upon an action on a contract, and the award is made after the bankruptcy, the costs are proveable? In *ex parte Poucher* (1824), 1 G. & J. 385, it was decided that, where the verdict is before the bankruptcy, in an action on a contract, the costs are proveable, although judgment is not signed until after the bankruptcy. In that case, the Vice-Chancellor, (Sir John

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Leach,) said, " It seems to me, upon authority as well as upon principle, that where, in an action founded upon contract, there is a verdict before bankruptcy, and judgment afterwards, there the costs, *de incremento*, are proveable, having, in effect, been incorporated with the existing debt by the verdict, though not ascertained in amount till the judgment (*a*) ; and that, notwithstanding the case of *Longford v. Ellis* (*b*), which is indeed opposed by that of *Walker v. Sherlock* (*c*), there is in this respect a distinction between a verdict in tort, and a verdict in contract; that in tort there is no debt whatever with which the costs can be incorporated until the judgment."

In *Greenway v. Fisher*, 7 B. & C. 437, (which, although decided in 1827, after the new bankrupt act came into operation, depended upon the law under the old acts,) it was determined that, where a verdict in trover was obtained in vacation, before an act of bankruptcy committed during term time, upon which a commission issued during the term, and final judgment was signed after the bankruptcy, but in the same term, the costs were proveable, as the judgment related to the first day of the term. Such is the disposition of the Court to admit the proof of costs, and which it seems to have been the intention of the legislature by 6 Geo. 4. c. 16. s. 58. to permit in all cases.

In the present case the action was on a contract, and the verdict was given before the commission, subject to

(*a*) In *ex parte Charles*, 14 East, are accessorial to the damages 308, Lord *Ellenborough* said: found for the plaintiff at the trial." " The costs taxed at law are

only an extension of those for (*b*) Cited 11 Ves. 652.

which the verdict is taken; the (*c*) Cited 3 Will. 270. 272. and subsequent order for taxation is 11 Ves. 651.
only for costs *de incremento*, which

an award, which award, when made, referred back to the verdict. The case, therefore, of *ex parte Poucher*, in which all the previous decisions were reviewed, governs this question, and shews that the costs are proveable.

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Mr. *Rose* for the respondents:—

The case of *ex parte Hill*, 11 *Ves.* 646, in which all the authorities are most fully examined by Lord *Eldon*, and which may be called a treatise on the law of costs, determines, that a verdict, after the bankruptcy, for an antecedent debt by contract, does not entitle the plaintiff to prove for the costs on the judgment which he afterwards signs; it is not the verdict, but the judgment which creates the debt. That the verdict does not create the debt is evident, not only from the nature of a verdict, but from *ex parte Charles*, 16 *Ves.* 256; and 14 *East*, 197.

It is most material that the Court should advert to what is said by Lord *Eldon* in *ex parte Hill*, in reviewing the cases of *ex parte Todd*, *Walker v. Sherlock*, and *Graham v. Benton* (a), because it may be fairly inferred, from the tenor of his observations, that the conclusion of his mind was against the proving of costs whenever the bankruptcy occurs between the verdict and judgment, and that in this respect his opinion was supported by the decisions of Lord *Henley* and Lord *Thurlow*. The question, whether the demand, against the bankrupt, for these costs, is not barred by the certificate, is immaterial, because it does not follow that, if barred, they are proveable under the commission. This may be inferred from the judgments of Lord *Eldon* in *ex parte Hill*, of the Vice-Chancellor in *ex parte Poucher*, and from other cases.

(a) See 11 *Ves.* pages 652, 653, &c.

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The words of the 6 Geo. 4. c. 16. s. 58. are, “that if any plaintiff, in any action at law or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree, or order, against any person who shall thereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.” Can any thing be clearer than the words of this clause? Here there was a verdict for a nominal sum, subject to an award, which was not made until after the commission issued. It can never be maintained, therefore, that the sum due was ascertained by the verdict in this case.

The decision in *ex parte Poucher* can hardly be reconciled with the opinions expressed by Lord *Eldon* in *ex parte Hill*; but, even supposing that it can, this material distinction must be observed, that in *ex parte Poucher* the verdict ascertained the exact debt due to the plaintiff, whilst here, the verdict was taken by consent for a nominal sum, subject to an inquiry, which was not terminated when the commission issued.

Mr. *Sugden* in reply :—

In the case of *ex parte Hill* both the verdict and judgment were after bankruptcy, and the opinions there expressed by Lord *Eldon* must be considered with reference to the subject matter; but the concluding paragraph of the judgment appears to me to warrant an inference, that where there is a verdict prior to the bankruptcy, and the judgment afterwards, the costs are

proveable. The opinions of Mr. Baron *Hullock* in his work on costs, of Mr. *Cullen* in his work on the bankrupt laws, p. 105, and the cases there cited, *Aylett v. Harford*, Bl. 1317, *ex parte Simson*, 3 Bro. 46, are also authorities in support of this application.

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The 58th section of the late act does not apply to a case like the present, and can never be held to exclude the petitioners, because, by the law before and independently of the statute, the costs are to be referred back to the verdict, and the verdict being proveable, the costs must be proved also.

The case stood over for judgment. On this day the Vice-Chancellor, after having stated the facts and the different dates, said : — *August 15.*

I should have thought the costs proveable, even without the authority of *ex parte Poucher* ; but since that decision all doubt appears to me to be removed. The order, therefore, must be made, that the costs be proved ; and let the costs of this petition be paid out of the estate.

Ordered accordingly. (a)

(a) In the recent case of *Haswell v. Thorogood*, 7 B. & C. 705, where a cause and all matters of difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter, and between the time of making the order of reference and taxing costs, and signing judgment, the plaintiff became bankrupt, it was decided that the amount of the taxed costs did not constitute a debt proveable under the commission, and that the bankrupt was not discharged as to that debt by his certificate.

L. C.
August 19,
1828.

An assignee,
under particular
circumstances,
permitted to bid
at the sale of the
bankrupt's
estate, his soli-
citor not having
the management
of the sale.

Ex parte MORLAND. — In the matter of PYNE.

THIS was a petition by an assignee for permission to bid at a sale of part of the bankrupt's estate, or that he might be discharged from being assignee. The estate had been previously offered for sale by public auction, but no bidder appeared.

Mr. *Knight* for the petition.

Mr. *Montagu*, for the respondents, consented to such order as the Court might please to make.

The LORD CHANCELLOR : —

Although in general an assignee ought to be removed before he can be permitted to bid, yet in the present case, as no doubt can be entertained of the respectability of the petitioner, and as the respondents not only consent, but are desirous that Mr. *Morland* should continue assignee, let him, without being removed, bid at the sale. His solicitor, however, must not have the conduct or management of the sale.

Ordered accordingly.



Ex parte GRANT. — In the matter of GRANT.

V. C.
LINC. INN,
October 24,
1828.

THE petition stated that at a dividend meeting on the 23d of January 1819, a claim for the sum of 2,000*l.* was preferred and entered on behalf of the corporation of the Royal Exchange assurance company; that the commissioners ordered a dividend of 4*s.* in the pound to be paid (according to the usual form) “ to all the said bankrupt’s creditors who have proved their debts, and unto the claimants when they shall have substantiated their claims, in proportion to their several debts;” that *D. Campbell*, the sole assignee, was authorised to retain in his hands, for the creditors and claimants, the sum of 3,204*l.* 13*s.* 4*d.*; that on the 4th of March 1819 a commission of bankrupt issued against *Campbell*, when it appeared that he had appropriated to his own use the greater part of the said sum of 3,204*l.* 13*s.* 4*d.*; that the creditors of *Grant* who had proved, but who had neglected to receive their dividends, afterwards proved for the same as debts under the commission against *Campbell*; that on the 20th of March 1819 another meeting was held under *Grant*’s commission, when the present petitioner was appointed assignee in the place of *Campbell*; that at this meeting no person attended to establish the claim of the Royal Exchange assurance company; but that at a subsequent meeting, held on the 11th of April 1826, the corporation proved for the sum of 2,000*l.* upon a bond into which the bankrupt had entered as surety for a third person; that the commissioners then proceeded to declare a further dividend under *Grant*’s commission; and having first directed that the dividend of 4*s.* in the pound should be paid to the corporation out of the assets realized by the peti-

At a dividend meeting under a commission against A., a claim was entered on behalf of B., and a sum, ordered to be appropriated in the hands of C., the sole assignee, to answer eventually the amount of the several sums proved and claimed. But before the claim of B. was perfected into a proof, C. misapplied the money so placed in his hands, and became bankrupt: Held, that B. was not entitled to recover from the estate of A. his proportion of the sum appropriated in the hands of C. and misapplied by him.

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tioner subsequent to his appointment as assignee, they ordered that a further dividend of 2s. 6d. in the pound should be paid to all the creditors (including the corporation) who had proved against *Grant's* estate.

The petitioner submitted, that the order of dividend of the 23d of January 1819, of the sum of 3,204l. 13s. 4d., was a specific appropriation of that sum, and that the Royal Exchange assurance company were not entitled to resort to the assets of the bankrupt *Grant* for any part of the dividend of 4s. in the pound.

The petition prayed that the commissioners might be directed to review their order of dividend of the 11th of April 1826.

Mr. Horne and *Mr. Treslove* for the petition : —

The Royal Exchange assurance company applied to the commissioners to be admitted claimants, and they were admitted: the effect of such admission was to secure part of the assets for the purpose of meeting their demand, so soon as that demand should be perfected into a proof. This made it a trust fund in the hands of the assignée, for the benefit of the corporation.

The claim in question was afterwards matured into a proof; but were not all the creditors bound to the appropriation made in the first instance on behalf of the company? The effect of the order of dividend was to separate a sum equivalent to 4s. in the pound on the amount of the claim from the bulk of the estate; and no creditor, after the entry of the claim, could have been heard against the company to question that appropri-

ation. Supposing new creditors had appeared, they would not have been entitled to divide any part of the fund so appropriated. Common justice, then, requires that it should not be considered an appropriation for their benefit, without entailing with it the ordinary consequences of an appropriation. The question, therefore, resolves itself into this: whether there was or was not an appropriation? for if there was, the loss must fall upon the claimants, and they should prove for the amount under the commission against *Campbell*. We contend that the claim entered and the order of dividend amounted to an appropriation. Formerly when a claim was matured into a proof, an action might have been maintained upon an order of dividend; but the statute of the 49th Geo. 3. c. 121. took away the right of action, and gave in the place of it a right to petition — a right in the creditor to come to the Court by petition, in the nature of an action for money had and received to his use, and to call for the aliquot part ordered to be paid to him. If the assignee *Campbell* had died, the corporation must have taken their remedy against the executors, and if he had died insolvent, they could not have resorted to the estate of *Grant*. It appears, then, in any way of viewing the question, that the proper course for the Royal Exchange assurance company to have pursued was, either to have proved, or, if not in a situation to have proved, at least to have preferred, a claim against the estate of *Campbell* for their share of the dividend appropriated in his hands at the time of his bankruptcy.

The last order of dividend, therefore, was clearly wrong, and ought to be rescinded.

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1828. ' Mr. *Bickersteth* for the respondents : —

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The claim preferred here was for the sum of 2,000*l.* ; and to pay the dividend of 4*s.* in the pound, a sum was left in the hands of the assignee sufficient to answer the amount of the sums proved, and the amount claimed by the corporation. Then a commission issued against the assignee, who retained in his hands at the time the greater part of the money so appropriated for the discharge of the sums proved and claimed. Can it be said that this was a specific appropriation for the Royal Exchange company? Their claim might never have been perfected into a proof. The debt arose upon a bond into which *Grant* had entered as a surety; and until the account between the company and the principal obligor was arranged, it was of course impossible to ascertain whether there would ever be a right to prove against this estate. Whilst this uncertainty existed, it is impossible to maintain that the appropriation of a gross sum by the commissioners' order, to answer eventually the sums proved and claimed, can be recognized as a specific appropriation of a particular sum for the corporation.

With regard to the supposed remedy against the bankrupt assignee, it is clear that until the claim of the company was perfected into a proof under *Grant's* commission, there could be no right to prove under the commission against *Campbell* for the sum lost in his hands. It is equally clear that there was no negligence on the part of the company in perfecting their proof, because, independently of the necessity of first settling their accounts with the person for whom *Grant* was surety under the bond, there was not in fact any inter-

vening meeting between the 23d of January 1819 and the bankruptcy of *Campbell*, at which the claim in question could have been perfected into a proof. The Royal Exchange company were never in a situation to demand any dividend from *Campbell*; and the commissioners decided correctly that the sum lost by his failure, so far as regards this claim, was a loss which properly fell upon the estate of *Grant*.

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The VICE CHANCELLOR : —

It is not necessary to consider whether the Royal Exchange company had a right of action or a right to petition against *Campbell* at the time of his failure. That point does not appear to me to be essential to a just consideration of the question. In consequence of the application made by the corporation to the commissioners, a separation of the assets was directed for their benefit, and a sum appropriated, in the hands of the assignee, to answer their claim so soon as it should be perfected into a proof. The result of their application has been, that the sum so appropriated for them has been lost in the hands of the assignee; and I think, therefore, that the Royal Exchange assurance company, and not the estate of the bankrupt *Grant*, ought to bear the loss sustained.

The prayer of the petition must be granted.

Ordered accordingly. (a)

(a) See *ex parte Wackerbath*, 2 Gl. & J. 151.

L. C.
 LINC. INN,
 October 25,
 November 5,
 1828.

Ex parte JOHNSTONE.— In the matter of
 STEVENS.

An application to the Court for an order to enrol the proceedings, under 6 Geo. 4. c. 16. s. 96., must be on petition. Assignees who refuse, at the request of parties interested, to enrol proceedings, which, before the 6 Geo. 4. c. 16., they were bound to produce on a subpoena duces tecum, refuse at the peril of costs.

AN action having been commenced by the messenger against the petitioning creditor, it became necessary for him to have the proceedings requisite to support the commission enrolled.

He first took out a summons in the action for the petitioning creditor, who was also assignee, to shew cause why the commission, adjudication, and assignment should not be enrolled; but the Court of Common Pleas, considering that they had no jurisdiction, dismissed the application with costs.

He then served the petitioning creditor and assignee with the following notice:—

“ Take notice, that you are required immediately to enrol or cause to be enrolled the commission of bankrupt bearing date on or about the 6th day of June 1826, awarded and issued, under the great seal of Great Britain, against *Thomas Stevens* of Weston-street, Southwark, baker, the adjudication of bankruptcy under the said commission, and the assignment of the personal estate and effects of the said bankrupt from the major part of the commissioners named in the said commission to you, I hereby undertaking to bear and pay the expence of such enrolment; and I hereby further give you notice, that unless the said commission, adjudication, and assignment are immediately enrolled, I shall apply to the Lord Chancellor of Great Britain on Wednesday next the 18th day of June instant, or so soon after as counsel can be heard, for an order to compel you to enrol the

same, and that you may pay the costs of that application. Dated the 11th day of June 1828."

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In pursuance of this notice, a motion was made to the Lord Chancellor, *ex parte*, by Mr. Rose, on behalf of the messenger, for an enrolment, which was ordered accordingly.

The present application was to rescind the order so made on motion.

Mr. Montagu for the petitioning creditor and assignee : —

The Court has not any jurisdiction to order an enrolment on motion. The only mode of proceeding before the Lord Chancellor, in bankruptcy, is by petition, and disobedience to an order on motion is not a contempt. *In re Morgan*, 1 Rose, 192 ; *ex parte Gitton*, Buck, 549 ; *in re Hardy*, 6 Mad. 252. The only exceptions, which in fact prove the rule, are applications, when the commission has not been opened, to make some alteration, in order to give effect or validity to the commission ; or in favour of liberty, for a prisoner to be discharged from an arrest, whether he has been improperly taken, or is entitled to his discharge by certificate, *Wall v. Atkinson*, 2 Rose, 196 ; or applications, from necessity, that service of the petition at the last place of abode may be good service, *ex parte Anderson*, Buck, 38 ; *ex parte Peyton*, Buck, 200 ; or, where there is a petition in Court, for permission to amend it, or to amend the order made upon it before it is drawn up at the secretary's office.

Such is the general mode of proceeding in bankruptcy ; and the question is, whether by 6 Geo. 4. c. 16.

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s. 96. any alteration has been directed in this mode of proceeding in cases where enrolment is required.

The words of the 6 Geo. 4. c. 16. s. 96., so far as they are material to the present question, are as follows: — No commission, adjudication of bankruptcy, assignment of personal estate, or certificate, “ shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid; and every such instrument shall be so entered of record upon the application of or on behalf of any person interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record as aforesaid.” The object of this clause was not to alter the mode of proceeding before the Lord Chancellor when enrolment was necessary, but to enable assignees, and, possibly, other parties, to require the officer in the enrolment office to enrol without a petition, which, by the 5 Geo. 2. c. 30. s. 41., he was not authorized to do without an order made by the Lord Chancellor upon petition.

But when an application to the Court is necessary, whether it be to compel the officer of enrolments to enrol, supposing he should refuse; or the assignees to produce the proceedings for the purpose of enrolment; or to procure an enrolment of any other part of the proceedings; — in all these cases the necessity of a petition is expressed by the words of the act.

The same point was decided by the Court in another bankruptcy a few days since.

Mr. *Rose, contra*, contended, that as an application to enrol might be made to the officer without a petition, the expence and delay attendant upon a petition was intended to be obviated by authorizing the same summary mode of proceeding, namely, an application to the Court on motion.

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The LORD CHANCELLOR : —

The object of the clause was to enable the officer to proceed in certain cases without any order ; but where an application to this Court is rendered necessary, there is no enactment to alter the ordinary mode of proceeding before this Court in bankruptcy, which, except in a few cases of necessity, has been always by petition.

The order made on motion was accordingly rescinded.

A petition was then presented by the messenger, on *November 5.*
the hearing of which the LORD CHANCELLOR said : —

Whenever an action is pending, those proceedings, namely, the commission, adjudication, and assignment, which the assignees were compellable to produce, before the late statute, upon a subpoena duces tecum, they ought to have enrolled at the request of the parties interested, without driving them to the necessity of applying to the Court ; and if this be refused by the assignees, I wish it to be understood that their refusal will be at the peril of costs.

In this case the assignees were bound to have the proceedings in question enrolled, because the party applying was, before the late act, entitled to have them produced for the purpose of being given in evidence. The prayer of the petition must, therefore, be granted, and with costs.

V. C.
LINC. INN,
October 27,
1828.

Ex parte RANDLESON. — In the matter of
HOBSON.

A., being agent of and also a partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes drawn by the company's cashier in Scotland, and made payable to the bearer, on demand, at the company's office in Leith: Held, that this was in violation of the statutes passed for the protection of the Bank of England, and that a debt founded on notes so issued, cannot be proved under a commission of bankrupt.

IN the month of April 1826 a commission issued against *Thomas Hobson* of Carlisle, under which he was duly found a bankrupt. Shortly after, a proof to the amount of 11,722*l.* 12*s.* 4*d.* was made by *Archibald Scot*, of the same place, banker, on the alleged balance of a cash account, and in respect of bills discounted by him for the bankrupt; but some doubt having afterwards arisen as to the validity, in point of law, of the whole or part of the debt proved, various examinations were taken before the commissioners, and subsequently the present petition was presented, praying that the proof in question might be either expunged or reduced in amount.

It appeared in evidence, that in the month of January 1825 *Scot*, who had previously carried on business at Langholm, in Scotland, as the agent of the "Leith Banking Company," came to reside at Carlisle, and opened an office there; that it was customary for him to receive weekly, and sometimes oftener, for the purpose of circulation, large parcels of notes of the "Leith Banking Company," which varied in amount from 1*l.* to 5*l.*, were signed by the accountant and cashier of the company, and made payable to the bearer on demand at the company's office in Leith; that *Scot* received a fixed salary of 1,250*l.* per annum, out of which he defrayed all the expences of the business at Carlisle; that the profits arose from the interest obtained upon the notes issued; that an account of all transactions was transmitted weekly to the company, but that *Scot* was responsible to them for any losses incurred; that *Scot*

was in the habit of drawing upon the bankers of the company in London; that by their orders his bills were from time to time duly honoured; and that the sums advanced to the bankrupt, in respect of which the proof was made, were partly composed of such notes and bills.

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It further appeared, that the "Leith Banking Company" consisted of more than six persons united in partnership, and that *Scot* was himself a partner in the company; that he also carried on business at Carlisle as a banker, on his own account, but had obtained no licence for that purpose from the stamp office, in pursuance of the 55 Geo. 3. c. 184. s. 24.

Mr. *Rose* and Mr. *Knight* for the petition:—

The question in this case is, whether, with reference to the acts of parliament passed for the protection of the Bank of England, this proof can be permitted to stand. It is clear that the "Leith Banking Company" consisted of more than six persons; that *Scot* opened an office at Carlisle as their agent; that the advances made by him to the bankrupt consisted, in part, of their notes, payable on demand; and that they derived the profit arising from such issues. Now by the statutes in question (a), which

(a) The statutes of the 6 Anne, not be lawful for any body corporate, or for any persons united in partnership, exceeding the number of six, to borrow, owe, or take up any money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." and the 21 G. 3. c. 60. s. 12. are these: "that it shall

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were continued by the 39 and 40 Geo. 3. c. 28., it was enacted, that it should not be lawful for any body corporate, or for any persons united or to be united in covenants or partnership, exceeding the number of six persons, to borrow, owe, or take up money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof; and it has been decided by the Court of King's Bench, *Broughton v. The Manchester Water Works Company*, 3 B. & A. 1, that an action cannot be supported on the acceptance of a corporation in contravention of this prohibition. Mr. Justice *Bayley*, in delivering his judgment in that case, expressly said, that the accepting of bills, or the issuing of promissory notes, payable at short dates, would infringe upon the exclusive privilege given to the Bank of England by the legislature. Here it is clear that the notes of the Leith Banking Company, issued within the English border, were issued in violation of these statutes, and no proof, so far as respects them, can be supported.

But it is also shewn that *Scot* never had any licence from the stamp office to issue notes on his own account, in pursuance of the 55 Geo. 3. c. 184. s. 24. (a) Under

(a) By the 55 Geo. 3. c. 184. s. 24. it was enacted, "That from and after the tenth day of October one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons, (except the Governor and Company of the Bank of England,) to issue any promissory notes for money, payable to the bearer on demand, hereby charged with a duty and allowed to be re-issued as aforesaid, without taking out a licence yearly for that purpose, which licence shall be granted by two or more of the said commissioners of stamps for the time being, or by some persons authorized in that behalf by the said commissioners or the major part of them, on payment of the duty charged thereon in the schedule hereunto annexed; and a separate and

this act; therefore, it is equally clear that the notes issued by *Scot* were illegally circulated; and it has been decided in many cases, that debts founded on any species of illegal contract, or money advanced for the furtherance and in the execution of any illegal contract, cannot be proved for under a commission of bankrupt. *Ex parte Bell*, 1 M. & S. 751.

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The proof is also objectionable, because it is in the name of *Scot* alone.

Mr. *Bickersteth* and Mr. *Whitmarsh* for the respondents: —

The objections in this case are such as ought not to be favoured in any court of justice. It is admitted that the bankrupt received value for the whole amount proved, but yet the assignees resist the right to recover any part of what was so received. We do not deny that *Scot* was a partner in the Leith Banking Company, or that he did on many occasions act as their agent at Carlisle; but he also carried on business upon his own account, and the notes being issued directly to him by the company, he afterwards dealt with them, in the course of his trade, by purchasing or discounting bills of exchange and other securities. If, then, the advances to the bankrupt consisted of notes which had been previously issued, can it be said that a licence was necessary for the mere purpose of re-issuing such notes? He might not have been entitled to issue notes of his own,

distinct licence shall be taken by, or by any agent or agents for out for or in respect of every or on account of, any banker or town or place where any such bankers, or other person or persons." promissory notes shall be issued

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but there was no reason why he should not circulate those which came to him from others in the ordinary course of his dealings. But, even in the most unfavourable view, these transactions fall within the rule laid down by Lord Mansfield in *Faithney v. Reynous*, 4 Burr, 2,072, distinguishing between what is *malum in se* and only *malum prohibitum*. This case is not so connected with illegal transactions that it is impossible or even difficult to disconnect it from them. Private justice is clearly on the side of *Scot*; the illegality, if any, was only *malum prohibitum*; and there was nothing directly in the contract or dealings between the lender and the borrower to preclude the former from recovering. *Ex parte Bulmer*, 13 Ves. 316. (a) *Scot* was a partner, cer-

(a) The distinction adopted by Lord Mansfield and the Court of King's Bench in *Faithney v. Reynous*, 4 Burr. 2,072, between *malum prohibitum* and *malum in se*, was recognized by Sir William Blackstone in his Commentaries, vol. iv. p. 2., in the case of *Petrie v. Hannay*, 5 T. R. 418, and afterwards by Lord Erskine in *ex parte Bulmer*, 13 Ves. 316. See also *Farmer v. Russell*, 1 Bos. & Pul. 396; and *Steers v. Lashley*, 6 T. R. 61.

The propriety of this distinction, however, seems always to have been doubted by Lord Kenyon, *Petrie v. Hannay*, *Steers v. Lashley* and *Booth v. Hodgson*, 6 T. R. 405; and it was expressly questioned by Lord Eldon in *Aubert v. Maze*, 2 Bos. & Pul. 371, and *ex parte Daniels*, 14 Ves.

192. See likewise *ex parte Mather*, 3 Ves. 373.; *Webb v. Brooke*, 3 Taunt. 12; *Otiley v. Brown*, 1 Ball & B. 366; *Lightfoot v. Tenant*, 1 Bos. & Pul. 554; and *Langton v. Hughes*, 1 M. & S. 593.

In the recent case of *Canan v. Bryce*, 5 B. & A. 179, all the authorities were fully examined and discussed; and Lord Tenterden, in delivering the judgment of the Court of King's Bench, made the following observations:—"The propriety of these decisions" (*Faithney v. Reynous*, and *Petrie v. Hannay*) "has been questioned in the several subsequent cases that were quoted on the part of the plaintiffs; and the distinction taken in the former of them, between *malum prohibitum* and *malum in se*, was expressly dis-

tainly, in the Leith Banking Company; but he was not acting as a partner in these transactions.

The VICE-CHANCELLOR:—

There is no difficulty in the part of this case which regards the issuing of the notes of the "Leith Banking Company." It is admitted by *Scot* that he was a partner of the company, and as such he must have participated in the profit arising from such issues, which were clearly in violation of the statutes passed for the protection of the Bank of England. But as to that part of the debt which arose from bills drawn upon London, it will be necessary that there should be some further enquiry.

Let it be declared, therefore, that the proof should be reduced, so far as it was founded on the notes of the Leith Banking Company payable to bearer on demand; which were issued to the bankrupt by *Scot*; and refer it back to the commissioners to enquire and state how and under what circumstances the remainder of the debt claimed was constituted.

Ordered accordingly.

lowed in the case of *Aubert v. Maze*. Indeed, we think no such distinction can be allowed in a court of law. The Court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done."

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of
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L. C.
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The pendency of an indictment is not a ground for deferring the hearing of a petition to supersede a commission of bankrupt, if the parties indicted do not object to proceed.

Ex parte BROMLEY — In the matter of
LITCHFIELD.

THIS was an appeal from the judgment of the Vice-Chancellor on a petition to supersede a commission for concert and fraud.

Mr. *Rose* and Mr. *Knight*, for the petitioners, stated, that a true bill had been found by a grand jury against the bankrupt, the petitioning creditor, and the solicitor to the commission, for conspiracy; and submitted, under these circumstances, that the petition ought to stand over until after the trial of the indictment.

Mr. *Pemberton* for the assignees, and Mr. *Hayter* for the bankrupt, objected to this course, on the ground of its being prejudicial to their clients.

The LORD CHANCELLOR referred to the case of *ex parte Welch*, in the matter of *Hawes*, in which the same point had been raised before him, and said he was of opinion, that if proceeding was likely to prejudice the parties indicted, they had a right to object; but that if they were desirous of having the petition determined, they were entitled to proceed. The petition was accordingly called on, and finally dismissed on the merits.

Ex parte FISKE. — In the matter of LAWRENCE.

L. C.

LINC. INN,
October 29,
1828.

THIS was an appeal against an order of the Vice-Chancellor, directing that the petitioner *Fiske* might be at liberty to go before the commissioners in a country commission, and tender and make such amount of proof as he could establish in respect of two sums claimed by him (both of which had been rejected by the commissioners on a preliminary objection), and also directing that the costs of the petitioner, as well as of the assignees, should be paid out of the bankrupt's estate. The Vice-Chancellor thought that the commissioners had erred in rejecting the proof; and the Lord Chancellor, on hearing the appeal, was of the same opinion.

An order was made by the Vice-Chancellor, and confirmed on appeal by the Lord Chancellor, that the petitioner should be admitted to prove a debt which the commissioners had rejected from an error in judgment: Held, that the costs of all parties should be paid out of the estate.

Mr. *Montagu* and Mr. *Knight*, for the appellant, amongst other points, submitted that the Vice-Chancellor had not followed the ordinary practice of the Court in granting costs to the petitioner on an appeal against the decision of the commissioners; that the rule had been settled many years since, "that costs should never be given against a decision of the commissioners, except where an issue is directed by the Court, upon a petition, and the result is against the decision, in which case the costs of the issue may be allowed." *Mont. B. L.* 301; *Edens, B. L.* 461.

Mr. *Horne* and Mr. *Whitmarsh* *contra*: —

The question of costs was fully discussed before the Vice-Chancellor, who considered, that as the commissioners had refused to enter into an examination of the proof tendered, it would be most unjust that the costs should not be borne by the estate. By too strict an

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application of the rule a party might be shut out from his remedy, in all cases where the costs of proceeding would probably amount to more than the debt sought to be proved.

If the application had been fully entered into, and the proof had been rejected by the commissioners after a full and deliberate examination of the alleged debt, both as to the amount and the circumstances under which it was contracted, there would be some appearance of reason for applying the rule.

The LORD CHANCELLOR : —

In one view of the case it is undoubtedly hard that the estate should have to bear the costs of an erroneous decision of the commissioners — a decision imputable to no improper motive, but which arose entirely from error in judgment on their parts. On the other hand, it would be equally hard that the petitioner should have to bear the costs in a case where his attempt to prove was stopped *in limine*, and where he was consequently compelled to resort to the Court for relief. Under these circumstances, I think the order of the Vice-Chancellor should be confirmed generally, and the costs of all parties paid out of the estate.

Ordered accordingly.

Ex parte GRELLIER and others. — In the matter of
M'NIELL.

V. C.
LANC. INN,
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THIS petition stated that two of the petitioners were in the employ and service of the bankrupt in his business of a coachmaker; as "body makers," and one of them "as a carriage maker;" that they were respectively paid for the work and service they performed as piecemen, and received a specified sum for each particular job which they executed; that the terms and conditions upon which they entered into the service of and worked for the bankrupt were as follows; viz. that they were not at liberty to quit their employment without completing the particular work or job they had in hand, but that they were liable to be discharged by the bankrupt without their having power to insist upon finishing such work or job; that they were not allowed to have any men working under them, or to take apprentices; that they did not find or provide any materials for the work which they performed; that they were compelled to work on the premises of the bankrupt, and were not permitted to work at their own residences; that they were not allowed to work for more than one coachmaker at the same time; that they were liable to be taken off from any work or job they might have begun, and obliged to commence any other that the bankrupt might think proper; that it was not the practice for the petitioners to wait until the work or job they had in hand was completed before they drew any money, but that they always drew for 1*l.*, 2*l.*, or 3*l.*, as it might be, on each Saturday night, leaving a balance in the hands of the bankrupt; that the bankrupt was indebted to them in various sums amounting altogether to more than 140*l.* on account of their services, and for wages from

The workmen of a coachmaker, who worked by the piece, and received a specified sum for each particular job under separate and distinct contracts, and where there was no hiring for a specific time, held to be servants within the meaning of the 6 Geo. 4. c. 16. s. 48.

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the 8th of November 1826 to the 8th of May 1827, the date of the commission; that at one of the public meetings under the commission the petitioners applied to the commissioners to order six months' wages or salary to be paid to them out of the estate of the bankrupt, and also to permit them to prove under the commission for any sum exceeding such amount; that the commissioners refused to make such order, on the ground that they were not either servants or clerks within the meaning of the 6 Geo. 4. c. 16. s. 48; the petitioners therefore prayed that they might be declared to be entitled to the benefit of the 48th section of the 6 Geo. 4. c. 16.

In opposition to the petition, affidavits were filed by one of the assignees, who was also a coachmaker, and by the bankrupt's son, stating, that according to the custom of the trade, the pieceman was not engaged by the master manufacturer for any specific or given time, but that each job or piece of work contracted to be done was a separate and distinct contract between the pieceman and the master manufacturer, and that on the completion of such job or piece of work, the pieceman was at liberty to cease to work for the master manufacturer, and the master manufacturer was at liberty to cease to employ the pieceman, without any notice being given or required on either side; and that immediately on the completion of each job or piece of work, but not before, unless as matter of special indulgence, the pieceman was entitled to be paid for such job or piece of work; that in the performance or execution of each job or piece of work, the pieceman was at liberty to work at such hours and times as he thought proper; and that he was not subject to any regulations of the master manufacturer as to the hours at which he should commence or leave off his work, or the number of hours during

which he should be engaged therein, or in any respect to obey or follow the directions of the master manufacturer in the manner of a servant, apprentice, clerk, or day-workman; that the terms and conditions upon which the petitioners were engaged by the bankrupt, were understood and agreed to be the terms and conditions which were usual and customary between piecemen and coach manufacturers, and, amongst the rest, the terms and conditions before mentioned; that the petitioners were allowed to have men working under them, or to take apprentices; and that, in fact, the petitioner *Thomas Grellier* did employ a man to work under him, for wages to be paid, and which were paid by the said *Thomas Grellier* during the whole of the period, and upon and for the several jobs or pieces of work, in respect of which he sought relief by his petition.

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Mr. Bickersteth and *Mr. Roots* for the petition : —

The question in this case is, whether, under the contract or agreement subsisting between the parties, the relation was such as that of master and servant. By the 6 Geo. 4. c. 16. s. 48. it is enacted, " That when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission, for any sum exceeding such last-mentioned amount." Under this section it has been determined by several lists of commissioners, that day-labourers, or persons acting as commercial travellers at a specified sum per month, are

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entitled to prove as servants. Here the materials upon which the petitioners worked were the property of the bankrupt, and the work itself was to be executed on his premises, and according to his orders and method, as the party with whom the contract was made. He exercised a perfect controul over them, so that until the specified work was completed, they were not at liberty to contract or engage in service with any other persons; and although they obtained money as they had occasion for it, there was no settlement of their accounts until the particular work or job in which they were employed was concluded. So long, therefore, as the work or job continued, the relation of master and servant existed; and if this be true as to one of such engagements, it must be equally true as to any succession of engagements. It may probably be contended, on the other side, that the petitioners worked by the piece, and not by time, and, therefore, that they cannot be brought under the description of "*servants*;" but as the petitioners were unable to enter the employment of any other person until the existing contract was completed, they must be considered as servants within the meaning of the act. There has not been hitherto any decision of the Court, but cases resembling this have occurred before the different lists of commissioners, and as there exists a diversity of opinion on the subject, the question becomes one of considerable importance. With regard to menial servants, the hiring is usually for an indefinite term; but there can be very little distinction, whether the parties are paid according to the time they are employed or the work performed by them.

Mr. Boteler and Mr. Booth contra: —

There was no contract here out of which the relation of master and servant could grow. The petitioners were not servants in the common and ordinary acceptation

of the word ; they received no wages, for by wages a periodical remuneration is meant ; but they made a contract, and at its termination claimed the amount for which they had stipulated. If the argument on the other side be correct, the weavers of Spitalfields or Manchester, who work by the piece, are the servants of their employers, and the sums they receive, which vary according to the *quantity* and *quality* of their work, must be considered "*wages*." The affidavits, in reply, shew clearly the nature of the contract, and the description of the service : it was nothing more than a master manufacturer employing workmen in his trade. The master could only require the particular work to be completed. If he brought an action, the form of it must have been for the non-performance or non-completion of the stipulated work, whilst against a servant it would have been for the non-fulfilment or non-completion of his service. Supposing the party to have been employed more than six months, and the work not to have been finished at the time of issuing the commission, there would be nothing "*due*," and consequently nothing proveable within the words of the statute. It is clear that persons in the situation of the petitioners were not intended by the legislature to be relieved as "servants," for "clerks," who come much nearer to such a description, are expressly mentioned in the clause ; nor can it be maintained that they are within the purview of the statute, for they were not hired, and were never under the order and controul of the master. They would not have been considered as male servants under the assessment acts, and supposing legacies to have been bequeathed to the "servants" of the bankrupt, they could not have been included under that description. (a) Wages are com-

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(a) In *Townshend v. Windham* the construction of the following (1705), in giving judgment on bequest in the duke of Bolton's

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monthly payable for a given time, yearly or half-yearly; here the petitioners did not receive wages; there was a price paid for a specific work.

The VICE CHANCELLOR : —

The 48th section of the act of parliament was expressly intended for the protection of the poorer classes, who cannot be considered as common creditors, and it must be construed liberally. The petitioners, it is plain, earned their remuneration solely by their labour or workmanship, for it is admitted that the master found all the materials. In the performance of that workmanship, I must conclude that there was an existing service, and I cannot consider them in any other character than servants.

will, viz. " I give and bequeath unto such of my servants as shall be living with me at the time of my death, one year's wages," the Lord Keeper (Sir *N. Wright*) said, " Stewards of courts and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will : but I will not narrow it to such servants only that lived in the testator's house, or had diet from him." 2 *Vernon*, 546. In *Chilcot v. Bromley*, 12 *Ves.* 114, a testator bequeathed to all his servants 500*l.* each; and Sir *Wm. Grant* determined that a coachman provided by a jobmaster, who also supplied a carriage and horses, which were hired by the

year, was not entitled to be considered a servant within the intendment of the will, observing : " Can the testator be supposed to include a person whom he had not selected, and chosen to bring into his service for any definite period, and with reference to the continuance of his service utterly uncertain." See the arguments of the judges in *Laugher v. Pointer*, 4 *B. & C.* 547, where it was held by *Abbott, C. J.*, and *Littledale, J.* diss. *Bayley* and *Holroyd, Js.*, that the owner of a carriage, where the coachman and horses were supplied by a stable-keeper for a day, was not liable to be sued for an injury caused by the negligent driving of the coachman.

The term wages admits of a very different description from that of periodical remuneration. The meaning of the word, in many cases, of which a familiar illustration might be given, is *reward*. The objection, that the computation cannot be made according to time, is not, I think, entitled to any weight. The amount that became due and payable during the last six months of the service is the sum for which the petitioners should be admitted to prove.

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Ordered accordingly. (a)

(a) The provision respecting servants and clerks in the 6 G. 4. c. 16. s. 48. seems to have been introduced from the Scotch bankrupt laws. Before the committee of the House of Commons appointed in 1818, to inquire into the bankrupt laws, one of the witnesses said: "With respect to the dividend, it may be deserving consideration whether creditors in certain cases ought not to have some priority in England; such priorities are given to friendly societies. (a) I have only to state, because they appear to me to originate in attention to cases of distress, that in Scotland funeral expences, medical assistance in the last illness, and servants' wages, have a priority; and perhaps the case of apprentice fees ought to be noticed."

Mr. Bell (Commentaries, vol. ii. p. 164,) observes, "1. The current wages of domestic servants, for a year or half a year previous to death, have long been considered as entitled to a privilege like that of funeral expences. And it would appear (especially from the decision immediately to be referred to) that the analogy of death should hold with respect to bankruptcy. It is only the current term for which the privilege is given, and that current term extends to the wages of a year, or half a year, or of a month, according to the contract or the usage of the place in which the contract of service was contracted. 2. On the bankruptcy of a tenant, the servants kept for the purposes of the farm have a privilege over other creditors for the wages of the term current at the bankruptcy. And

As regards the law of Scotland,

(a) Under 33 Geo. 3. c. 54., extended by 49 Geo. 3. c. 125.

V. C.
LINC. INN,
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1828.

A customer is not entitled to recover short bills in the hands of his bankers, at the time of their bankruptcy, where the habit of dealing between the parties was such as to warrant an inference that they mutually considered and treated such bills as cash.

in 1 Mont. & Blk.
to continue.

Ex parte THOMPSON and another. — In the matter of DILWORTH, ARTHINGTON, & BIRKETT.

THIS was a petition arising out of the bankruptcy of *Dilworth, Arthington, and Birkett*, bankers at Lancaster.

this privilege has been found to prevail even over the landlord's hypothec. 3. The claim for wages due to reapers, and other occasional labourers employed in raising and securing the crop, is privileged. 4. The artisan, servants of an artificer or mechanic, are not entitled to a similar privilege. 5. Wages or salary to the overseer of a manufactory are not privileged, and this will apply to clerks of merchants and manufacturers." (a)

The priorities admitted by the law of France are enumerated in the *Code Napoleon* (Code Civil, l. 3. t. 18. art. 2101), and amongst them we find, "Les salaires des gens de service, pour l'année échue, et ce qui est dû sur l'année courante." M. M. Boulay-Paty, in his Treatise "Des Faillites et Banqueroutes," observes (vol. ii. p. 14.), "Au rang des gens de service habituel dans la maison du failli, qui sont privilégiés pour l'année échue, et pour ce qui est dû pour l'année courante, on doit mettre

toutes les personnes qu'un commerçant emploie à son commerce, moyennant un salaire connu sous le nom de *gages et appointemens*, comme commis, caissier, teneur de livres, etc.; mais il ne faut pas étendre ce privilège à des employés salariés, qui sont mandataires pour certaines choses, comme le commis-voyageurs; la loi ne leur accorde aucun privilège; ils viennent en concurrence avec les autres créanciers chirographaires."

In explaining the relation of master and servant, Sir William Blackstone (Commentaries, vol. i. p. 425.) divides servants, as acknowledged by the laws of England, into four classes: 1. *Menial servants*, so called from being *intra mania*, or domestics, between whom and the master the contract arises upon the hiring. 2. Apprentices. 3. Labourers, who are only hired by the day or the week, and do not live *intra mania*, as part of the family. 4. Stewards, factors, and bailiffs, whom the law considers as ser-

(a) By the last Scotch bankrupt act, debts which were entitled to preference by the law of Scotland, are continued as before. Sec 54 G. 3. c. 137. s. 46.

The general mode in which the accounts were kept between Messrs. *Dilworth* and Co. and their customers, and the state of the account between *Dilworth* and Co.

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vants *pro tempore*, with regard to such of their acts as affect their masters or employers. The division is stated in more general terms in *Wood's Institutes*, p. 51: "Servants are *menial* or not so; *menial* being domestics, living within the walls of the house." See also an elaborate dissertation on the different sorts of servitude, in *Taylor's Elements of the Civil Law*, p. 413.

In crown cases, on the Embezzlement Act, persons seem to have been included under the description of servants, or servants and clerks, who could hardly in popular language be termed either the one or the other. *Res v. Hartley, Russell & Ryan*, 139; *Res v. Spencer, Id.* 299; and so in decisions on the 5 Eliz. c. 4. and under the Poor Laws, it would appear that the distinction between workman and servant has never been distinctly observed. The question, however, seems hardly to have arisen as to whether a particular person was to be considered as a servant, in the ordinary acceptance of the term, but only whether he was to be regarded as a hired servant within the meaning and with reference to the objects of the law as to settlements of the poor.

In the 7 Anne, c. 12. s. 3., as to the privileges of foreign ambassadors, the terms "domestic," or "domestic servants," are used; but even these words have received an enlarged construction, and are said to have been only "put by way of example." *Hopkins v. De Robeck*, 3 T. R. 79; *Novello v. Toogood*, 1 B. & C. 554. This statute, however, was only declaratory of the law of nations; per Lord Mansfield. *Trequet v. Bath*, 3 Burr, 1478.

If under the 6 Geo. 4. c. 16. s. 48., it was intended by the legislature to confine the term "servants" to *menials*, or those to whom the bankrupt stood in the relation of *pater-familias*, it may be regretted that less doubtful language was not used, because, although the preference of domestic servants to common creditors, is seldom likely to become a heavy burthen on the estate, yet if, from a more enlarged construction of the statute, the workmen of a manufacturer be held entitled to the same priority, cases may occur, in which a great portion of the bankrupt's assets will be exhausted, to the exclusion of ordinary creditors.

CASES IN BANKRUPTCY.

1826. and their London agents, Messrs. *Barclay* and Co., are fully stated in the report of the case of *ex parte Armitstead* in the matter of *Dilworth* and others, 2 Gl. & J. 371.

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of
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and others.

By the present petition it appeared that two bills of exchange were paid by the petitioners to their bankers, Messrs. *Dilworth* and Co., as follows :

When paid.	Amount.	Drawn.	Remitted to <i>Barclay</i> and Co.	Payable.
19 Jan. 1826.	£ s. d. 193 14 6	8 June 1825.	19 Jan. 1826.	11 Feb. 1826.
26 Jan. 1826.	460 0 0	24 Nov. 1825.	28 Jan. 1826.	27 March 1826.

These two bills were indorsed generally by the petitioners, at the respective times of paying them to *Dilworth* and Co.; and were on such days placed in their pass-book, and also in the books of the bank, to the petitioners' credit, according to the general custom of the bankers.

The bill for 193*l.* 14*s.* 6*d.* was indorsed generally by *Dilworth* and Co., and remitted, the same day that it was paid into the bank, to *Barclay* and Co., who, on the 11th February, the day on which it became due, received the proceeds, and placed them to the credit of *Dilworth* and Co.'s cash account, which was then in favour of *Barclay* and Co. The bill for 460*l.* was in like manner indorsed generally, and remitted, two days after it was paid in, to *Barclay* and Co., the cash account being still in their favour. It was retained by them till the 27th March 1826, when it became due, and they received the proceeds.

On the 10th of February 1826, *Dilworth*, *Arthington*, and *Birkett* stopped payment, and committed acts of

bankruptcy, on which a commission issued, dated February 18th, 1826.

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The petitioners prayed that it might be declared, that after satisfying the lien of *Barclay* and Co. they were entitled, out of the proceeds of the securities belonging to the bankrupts, in the hands of *Barclay* and Co., to be paid the amount of the two bills, and to prove for the residue. It was admitted by the counsel for the petitioners, that they were only entitled to the residue of the proceeds of the two bills after payment of their proportion, with other customers, whose bills had been remitted to *Barclay* and Co. in a similar manner, of the sum of 12,047*l.* 11*s.* 1*d.*, the balance of *Barclay* and Co.'s debt beyond the value of the securities which had been deposited with them by *Dilworth* and Co.

The affidavits in support of the petition stated, that the bills were deposited with the bankrupts to obtain payment of them on account of the petitioners, and that the bankrupts had no authority from the petitioners to deposit or pledge the bills with Messrs. *Barclay* and Co., nor to dispose of them for any purpose of their own. It was also stated, that at the time of paying in the two bills in question the bankrupts were indebted to the petitioners, and that the petitioners never had any advance, from the bankrupts having always had a balance in their favour. But it appeared that this would only be true on the balance of an account, including short bills on the one side, and running drafts and cash on the other.

The affidavits in opposition stated, that although *Dilworth* and Co. had no written or directly expressed authority from the petitioners to dispose of the bills of exchange, or to pledge them with *Barclay* and Co., yet

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they always understood that there was an implied authority from the petitioners and their other customers so to do, unless in any particular case an order was given to the contrary; and as evidence that the petitioners were aware of this custom, it was shewn that from March to the end of December 1822, the first year of keeping an account with the bank, the petitioners paid in forty-two short bills, thirty-five of which were, on the day of being paid in, or within a few days after, remitted to *Barclay and Co.*, and the remainder put into general circulation in Lancaster and its neighbourhood; that the same course was pursued in the four following years, and up to the time of the bankruptcy, but that the greater proportion of the bills was circulated in the neighbourhood of Lancaster; and that in the year 1823 a bill for 28*l.* 19*s.* 6*d.*, paid into the bank by the petitioners, was put into circulation in Lancaster, and returned to them dishonoured, with the general indorsement thereon of *Dilworth and Co.*, and of the person to whom it was paid, and that the petitioners never made any remonstrance, nor ever, during their dealings, gave any general directions to the petitioners not to put their bills in circulation.

The cashier of the bank, who received all bills paid in, stated that he never had any directions or intimation from the petitioners not to negotiate their bills to *Barclay and Co.*, nor did he ever receive any general directions or intimation not to send such bills into general circulation in the manner usually adopted by the bankrupts and other country bankers, except that in some few instances the petitioners directed that particular bills should not be put into general circulation, in order to prevent some of their connections in business from being known. Half-yearly accounts had been regu-

larly delivered to the petitioners, in which they were debited with interest on bills indorsed by them, and placed to their credit, but which were not due at the respective times of making up the half-yearly accounts; and the cash balance stated in such accounts to be due to the petitioners included the amount of such bills: to these accounts the petitioners never made any objections.

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It appeared from the books of the bank, and also from the pass-book, that the bankrupts were, from the time of opening the account, frequently in cash advance to the petitioners, and that the latter rarely paid any thing but short bills and promissory notes into the bank. The general balance in favour of the petitioners, including short bills on the one side, and cash payments and running drafts on the other, amounted, at the date of the commission, to the sum of \$104. 11s. 3d.; but the balance in their favour was afterwards considerably increased, in consequence of running drafts of the bankers, drawn in favour of the petitioners, having been dishonoured after the bankruptcy.

Mr. *Rose* and Mr. *Booth* for the petitioners:—

The first inquiry is whether this case can be distinguished in principle from *ex parte Pease*, 1 *Rose*, 232, and the class of cases which arose out of the bankruptcy of *Boldero* and Co. Here, indeed, the amount of one of these bills was received and carried to the cash account of the bankrupts, previously to the date of the commission; but the assignment having relation back to the acts of bankruptcy, and these having occurred one day before the bill became due, both bills will fall within the operation of the same rule. There is, in fact, no material

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difference between this case and the cases of *Giles v. Thompson*, 2 B. & C. 422, and *ex parte Armistead*, 2 Gl. & J. 371. (a) The latter, which was decided by the present Chancellor, arose out of this bankruptcy. The custom of bankers in the county of Lancashire, and the circulation by means of short bills, were expressly mentioned. In this case, indeed, the customer's personal knowledge of the practice of the bankers as to short bills is introduced, with a view of distinguishing it from *Thompson v. Giles*, but from the statements in the printed report of that case, it must be presumed that the customer had such personal knowledge. There the bills remained in specie in the hands of the bankers, whilst in this case they were remitted to *Barsley and Co.*; a difference, however, which will affect only the mode and degree, not the principle of relief. In *Thompson v. Giles*, the assignees were liable to an action of trover for recovery of the bills, but here they can only be reached through the medium of the Chancellor's jurisdiction. The bills are as much distinguishable from other property as if they had been locked up in a box on being deposited as a security. *Barsley and Co.* certainly had a lien on them for their debt, but having other securities, this Court will compel them to resort, in the first place, to such securities.

The general indorsement of the customer did not affect his right of property in the bills; it merely enabled the bankers to avail themselves, in case of need, of that

(a) There is an error in the printed report of this case, in representing the bills as payable before the bankruptcy. Neither of them became due until after the bankruptcy. The mistake probably arose from supposing that the bills were made payable ninety days after date, instead of ninety days after sight.

lien for the repayment of any advances made by them to the customer—a lien which we do not deny, although there never was occasion to enforce it; but subject to such lien, the property in the bills remained in the petitioners. The mode of entry in the banker's books will not conclude the question; it is merely a circumstance from which, if acquiesced in, the contract between the parties may be inferred, *ex parte Sargeant*, 1 *Rose*, 159; but here the bills are entered as such, and thereby distinguished from cash entries. The bankers in this case must be considered as mere factors or agents, to receive the amount of the bills, when due, on account of the customer; and unless they can divest themselves of this character, the petitioners are entitled to the relief they ask. *Thole v. Hollingworth*, 5 *T. R.* 215; *Taylor v. Plumer*, 3 *M. & S.* 502.

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Mr. Sugden, Mr. Knight, and Mr. Geldart for the assignees:—

If the decisions which have been cited are applicable to a case like the present, it will be impossible for any country banker to carry on his business, for he will have no funds to trade with. The banking books shew that in the course of four years, the time that the petitioners kept an account with the bankrupts, there were not more than five or six entries of cash payments by them. At the opening of the account, short bills were the only funds placed in the hands of the bankers, and on them, before they became due, cash advances were made by answering the petitioners' cheques, and drafts made payable in London: and such has been the constant practice down to the time of the bankruptcy. Short bills were the only funds with which the bankers were furnished. If the customer was entitled to draw, and actually did

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draw upon the bank, nearly to the full amount of these bills, and the bankers were not at liberty to use the only funds in their power, what mutual advantage could there be? The bankers would be unable to meet the engagements entered into for the accommodation of their customers, without an immense capital in cash. The Court will look at the case, not of these customers only, but of all. An adequate remuneration must be had for the use of such a capital, and this must be made either by charging the customers with an increased commission, or by depriving them of the interest which it was the practice to allow them, whenever the cash balance was in their favour.

The cases arising out of *Boldero's* bankruptcy, which have been referred to, are applicable only to the practice of London bankers; with them the mode of dealing is different; no interest is allowed; undue bills are entered as short bills, and not carried over to the cash credit of the customer until they are paid; then, and not before, is he entitled to draw for the amount. Here every bill paid in by the customer, which was approved of, was immediately placed to the credit of the fund on which he was entitled to draw. To say that the bills were entered as bills is begging the question. The true inquiry is, whether the mode of dealing was such as to shew that both parties considered and treated them as cash; and as to this point, the observations of Lord *Eldon* in *ex parte Sargeant*, 1 *Rose*, 154, are decisive.

The soundness of the decision in *Thompson v. Giles* may well be doubted, although there, and in the case of *ex parte Armitstead*, the bank was never in cash advance to the customer; but if it be shewn, that these petitioners drew upon the bank in such a way that it became neces-

sary to use their bills, then we distinguish this case from the cases mentioned, and bring it within the exception which is alluded to in them. Now it appears from the books of the bank and the pass-book, that from the first opening of the account the petitioners treated these bills as cash, and drew upon them accordingly: for instance, in June 1822, the balance to the petitioners' credit was 1,200*l.* 12*s.*, arising from a bill not due till the 1st of August; yet on this balance, and another bill not due until the 7th of August, the petitioners received, in the previous month of July, cash to the amount of 360*l.* Again, on the 31st of December 1822 the balance to their credit was 722*l.*, arising, with the exception of a sum of 12*l.* 6*s.* 7*d.* for interest, from short bills, none of which became due until the middle of March following; yet on this balance, and other undue bills, the petitioners received, in the preceding month of January, cash to the amount of 468*l.* 13*s.* 6*d.* Similar cash advances will be found throughout the accounts; and, as already shewn, the bank was in cash advance to the petitioners, after the time when the bills now sought to be recovered were paid in. So great, indeed, was the advantage the petitioners took of their privilege to draw on short bills as cash, that in the half-yearly account preceding the bankruptcy the balance of interest in their favour was only 2*l.* 9*s.* 3*d.*, although they had transacted business with the bank to the amount of thousands. The mode of making out these half-yearly accounts, by placing to the customer's credit the amount of bills then undue, after debiting him with interest up to the time of payment, is in fact a discount of those particular bills. Under all these circumstances, it is impossible to say, that the bankers were not justified in using these bills as their own; the inference is clear, that there was a tacit understanding with the customer that they were to be so used;

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the practice of country bankers is notorious, and the general indorsement of the petitioners is in accordance with that practice.

To grant the relief required by this petition would have the effect of placing customers who have paid undue bills only into a bank, and have then, from time to time, drawn upon them as cash, in a better situation than other customers, who, with no greater advantage in drawing, have paid cash alone into the bank, and have had a balance constantly in their favour.

The VICE-CHANCELLOR:—

It appears to me that this is not a case that can be governed by the decisions in *Thompson v. Giles*, or *ex parte Armitstead*. I should be extremely unwilling to have it thought that I placed my judgment in opposition to that of the Lord Chancellor; but it seems to me that the circumstances are dissimilar, and that this case must be governed by the doctrine upon which Lord Eldon proceeded in *ex parte Sargeant*. In that case his lordship said, "It is quite clear that short bills in the possession of bankers are to be considered as still remaining in the possession of the parties, by their agents to be specifically returned; and if these bills were written short, the petitioner would have compelled Kensington and Co. so to settle with Burrough as not to break in upon his claim. That they were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash, and he drawing or entitled to draw upon them, as having that credit in cash, he would thereby be precluded from recurring to them specifically;" and

then Lord *Eldon* says, "Take an inquiry before the commissioners, and declare the petitioner entitled to the proceeds of the bills, unless, by his consent, or from the habit of dealing between the parties, they can be considered as cash."

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It does not appear, from the cases of *Thompson v. Giles* or *ex parte Armitstead*, that the accounts were at all similar to the account in this case between the petitioners and the Lancaster bank, because here there are only three entries of cash from the beginning to the end. There was nothing originally against which the customer drawing upon the bank could rely on as a fund, except bills paid in; and I cannot but infer from the state of the account, and what appears from the pass-book, which is always considered as evidence against the customer, supposing it passes in the ordinary way, that the habit of dealing was of necessity such as to give to the country bankers the right to deal with the short bills paid in as cash; and, added to the inference that results from the pass-book, there is evidence stated, that in one or two instances there was an express direction given by the customer not to circulate certain bills. But supposing the affidavits do not substantiate the fact that in two or three instances there was an express direction given that certain bills should not be circulated, it would still appear, from the general dealing, that there was a right on the part of the bankers to deal with the bills as cash; and what difference is there between telling the bankers that they may so use any bills, and drawing upon them in such a way as to make it necessary for them to do so? Supposing it, on the other hand, to be established in evidence, that there was a direction given in two or three instances, the very interposition of a specific direction goes to confirm the general inference.

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This case, therefore, appears to me to fall within the words of Lord Eldon in *ex parte Sargeant*, that it is to be inferred from the habits of dealing between the parties, that the bills were considered as cash; and without meaning to infringe upon the decision of *Thompson v. Giles*, or *ex parte Armitstead*, my opinion is, that the petitioners are not entitled to the relief they ask.

Petition dismissed, with costs.

Three similar petitions of other customers were dismissed, with costs, without being argued.



V. C.
Mich. Term,
November 7,
1828.

An equitable mortgagee, by deposit of deeds without writing, exempted from paying the costs of his petition, the mortgagor having subsequently written a letter directing him to hold the deeds, after payment of his own mortgage, for a second mortgagee.

Ex parte REID. — In the matter of LEEK.

ON a petition by an equitable mortgagee, the question was as to the costs of the application, the petitioner being the first equitable mortgagee by deposit of deeds, without writing (excepting a receipt signed by the mortgagee's clerk on receiving the deposit); but the bankrupt having subsequently, on taking up money from another person, written a letter to the petitioner, directing him to hold the deeds, after payment of his own mortgage, for the second mortgagee, the Vice-Chancellor held that this was a sufficient memorandum in writing, under the circumstances, to exempt the petitioner from paying the costs of the application.

Mr. Sugden and Mr. Knight for petition.

Mr. Horne *contra*.

Ex parte HAWKINS. — In the matter of WATSON.

WATSON deposited a lease with *Foxhall*, as security for 130*l*.

Under a commission against *Watson*, *Foxhall* obtained the usual order for a sale of the lease, which was accordingly put up to auction, and sold to the petitioner for 200*l*.

The assignees refused to accept the lease, and the bankrupt refused to deliver possession.

Foxhall then presented a petition, praying that *Watson* might be ordered to quit, and deliver possession to the assignees, or such person as they should appoint; and that the assignees might be ordered, upon payment of the purchase money, to execute an assignment to the petitioner.

The VICE-CHANCELLOR (*Sir John Leach*) ordered that the assignees, on payment of the purchase money, should execute an assignment to the petitioner of such interest in the premises as the bankrupt had therein, (but the assignees were not to be required to join in any warranty of title,) and that the bankrupt should deliver up possession to the petitioner.

The order was in all respects obeyed by the petitioner and the assignees, but the bankrupt refused to deliver up possession.

This petition was in consequence presented, praying that the bankrupt might be committed.

L. C.

LINC. INN,
December 5,
1828.

The lease of a house belonging to the bankrupt having been sold by auction under the usual order, the Court directed the assignees to execute an assignment, and the bankrupt to deliver up possession to the purchaser: Upon refusing to comply, the bankrupt was ordered to be committed.

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1824.

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The petition was heard before the VICE-CHANCELLOR, (Sir *A. Hart*,) who, upon the hearing, pronounced an order of commitment, but afterwards, doubting the jurisdiction of the Court, declined to sign the order, and intimated his wish that the subject should be mentioned to the Lord Chancellor.

Dec. 5.

Upon opening the petition this day, and after hearing the reasons assigned by the bankrupt for not delivering possession, his Lordship ordered him to be committed.

Mr. *Sugden* and Mr. *Montagu* for the petitioner.

Mr. *Whitmarsh* *contra*.



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Ex parte EDWARDS.—In the matter of
SCHLESINGER.

Two parcels of goods were sold at different times, and paid for by two distinct bills; the vendee afterwards becoming bankrupt, the vendor proved under the commission for the amount of the first parcel, being then the holder of the bill given in

THIS was an appeal from the decision of the Vice-Chancellor in *ex parte Schlesinger*, 2 G. & J. 392.

The facts were as follow: On the 6th of April 1826, the bankrupt *Schlesinger* purchased goods from *Edwards*, to the amount of 135*l.* 16*s.* 6*d.*, for which, on the 14th of the same month, he gave *Edwards* a bill of exchange for that amount, payable three months after date.

payment for the same: the bill for the other parcel was outstanding in the hands of a party to whom it had been negotiated prior to the bankruptcy, but who had given notice of its dishonour: Held, that the vendor was not precluded, under 6 Geo. 4. c. 16. s. 59., from bringing an action against the bankrupt for the amount of the last parcel of goods; and that he would not have been precluded, even if he had been the holder of the second bill at the time of his so proving for the amount of the first parcel of goods.

On the 11th of April 1826, the bankrupt purchased a second parcel of goods from *Edwards*, to the amount of 88*l.* 3*s.*, for which, on the 24th of the same month, he gave a bill for that sum, also payable three months after date.

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These bills became due respectively on the 17th and 27th of July 1826, and were dishonoured.

The commission issued on the 6th of November 1826, at which time *Edwards* held the bill for 135*l.* 16*s.*, but the bill for 88*l.* 3*s.* was held by a person to whom it had been transferred, prior to the bankruptcy, for a valuable consideration, and who had given due notice of its dishonour. Shortly after the issuing of the commission, *Edwards* proved the debt of 135*l.* 16*s.* 6*d.*, and subsequently to this proof the bill for 88*l.* 3*s.* was returned to *Edwards*, and he commenced an action upon it against the bankrupt.

The question was, whether having proved the debt of 135*l.* 16*s.* 6*d.*, *Edwards* was entitled to proceed at law for the debt of 88*l.* 3*s.* The Vice-Chancellor was of opinion that he could not, and made an order restraining him from proceeding further in the action. Against this order the present appeal was preferred.

Mr. *Montagu* and Mr. *Cooper* for the petition : —

The words of the 6 Geo. 4. c. 16. s. 59., upon the construction of which this case depends, are: " That no creditor who has brought any action or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as

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a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed."

Watson v. Meder, 1 B. & A. 121, is in substance, if not in words, the case now before the Court. There the plaintiffs had sold to the defendant two parcels of goods at two different times, for the amount of which they had taken upon each sale a bill of exchange, payable to them or order. The defendant afterwards becoming bankrupt, the plaintiffs proved under the commission for the amount of the first parcel of goods, for which they still held the bill of exchange. The other bill was at that time in the hands of a third person, having been negotiated by the plaintiffs prior to the bankruptcy, but shortly after the plaintiffs had proved, it was returned to them dishonoured, whereupon they arrested the defendant for the amount of the parcel of goods for which that bill had been given. The Court held that the plaintiff, notwithstanding his proof, was entitled to proceed at law upon the bill afterwards returned to him; and *Bayley J.* says: "The commissioners would not have allowed the plaintiffs to prove the other debt. As to that debt, at the time of the bankruptcy, they had not a complete right vested in them. The plaintiffs prove for all

they could prove, and it depended entirely upon accident, whether they could ever be in a situation to prove for the other demand."

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In *Hurley v. Greenwood*, 5 B. & A. 95, a creditor of 150*l.* for goods sold at different times, for which he had received five bills of exchange, proved one of the bills for 47*l.*, and although at the time of such proof (a) he was the holder of the other four bills, the Court held that this proof upon one bill did not estop him from proceeding at law upon the other bills. Bayley J. expressly said: "The 47*l.* was a distinct debt, due upon one bill of exchange, and the other sums of money were distinct debts, due on the other bills; and the bills themselves were not given for that which had been one entire debt, but in payment of distinct sums of money due for four several parcels of goods; and the debts, therefore, were originally contracted as distinct and separate debts. I cannot, therefore, say that the proof of the 47*l.*, which was not originally parcel of one entire debt, and which was not afterwards covered by one entire security, can be considered as any proof of the other debts."

The same point was decided in *Bridget v. Mills*, 4 Bing. 18. The bankrupt was indebted as follows:

(a) This appears in the argument of Mr. *Marryat*, who says, "The case of *Watson v. Meder* is not exactly in point with the present. The plaintiff there, at the time of making his proof for the first parcel of the goods, the bill for which he then held, was not the holder of the bill for the second parcel; for he had negotiated

that bill, and it was not returned to him until after the proof. In this case, the last plea alleges the plaintiff to have been the creditor for the whole sum at the time he proved a part, and that he was the holder of all the bills at the time he proved one." 5 B. & A. 100.

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242*l.* 13*s.* 11*d.*, for which no bill was given; 604*l.* 7*s.* 9*d.*, for which four bills were given; 206*l.* 9*s.*, for which two bills were given, and which were negotiated. In January 1826 the commission issued, and in the same month the creditor proved the debt of 242*l.* 13*s.* 11*d.* In June the two bills for 206*l.* 9*s.* were returned. In September the creditor proved the debt of 604*l.* 7*s.* 9*d.*, and afterwards proceeded at law upon the two bills for 206*l.* 9*s.*, which the Court held he was entitled to do, observing, "that there was nothing in the statute to prevent a creditor from suing for one debt, because he had proved another unconnected with it, and adding, that it was clear he had a right to sue for or to prove each individual debt, as might best suit his purpose."

The next case is *ex parte Sly*, 2 G. & J. 163, which was decided by the Vice-Chancellor (Sir John Leach). In this case the bankrupt had accepted two bills, for goods sold and delivered at different times, which were both dishonoured before the bankruptcy. At the time the commission issued the creditor held one of the bills, which he proved; and upon the other bill being returned to him, after the proof, he proceeded at law against the bankrupt. The learned Judge observed: "When bills are given the debt becomes assignable by the mere transfer of the bills; and the creditor, having thus received an assignable debt before the bankruptcy, by parting with one of the bills assigns so much of the debt, and the holder is from that moment the creditor of the bankrupt, and during the interval of his possessing this bill is the only one who could prove it. At the time, therefore, that the creditor proved one part of the debt, he had assigned the other, not only in equity but at law. After the bankruptcy he receives what may be termed a re-assignment, that is. he gets back the bill by payment;

he is thus a creditor of the bankrupt upon an entirely new debt; and I must decide, that this is not a proceeding for the same demand for which the proof was made."

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On the hearing of the present case before the Vice-Chancellor, the counsel for the bankrupt attempted to distinguish it from the previous cases, by saying, "*Ex parte Sly* has settled the point as to what shall be the test of a creditor's right to proceed at-law or not; viz. was it in his power when he proved one of the bills to have proved the other? In *ex parte Sly* he clearly could not, for the bill was undue and outstanding at the time, but in the present case both bills had been dishonoured before the bankruptcy; and it is a fallacy to say, that the bill was outstanding, when he had actually received notice of its dishonour, and without doubt had been debited with the amount by *Budd*, in whose hands the creditor allowed it to remain. It was competent to him to prove or to claim, and he cannot therefore proceed at law." But this reasoning is erroneous; first, because the test of a creditor's right is not that when it was in his power to prove one of the bills he might have proved the other, as is expressly decided in *Bridget v. Mills* and *Harley v. Greenwood*; and secondly, because if it were the test, here *Edwards* could not at the time he proved one have proved or claimed the other, as the right so to prove or claim was not in him, but in the holder of the bill.

The judgment of the Vice-Chancellor in this case may be divided into two parts: 1st, His Honor said, "that the bills were only two parts of one simple contract debt, though they were given at different dates. Had they remained in the drawer's hands, without doubt they might have been exhibited as security for the goods sold,

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and recoverable in an action." But the same observation is applicable to all the previous cases, viz. *Watson v. Medex*, *Harley v. Greenwood*, *Bridget v. Mills*, and *ex parte Sly*, the particulars of which have been already stated. 2dly, His Honor said, "In *ex parte Sly*, the bill upon which the action was commenced did not become due until after the proof of the first, and the drawer was not then in a situation to prove it, the Vice-Chancellor, therefore, rightly treated it as a distinct debt. But here both bills were given under circumstances which would have supported one action; they were both dishonoured at the date of the commission; and before the proof of the one it is not denied that he had notice of the dishonour of the other. That bill, therefore, might also have been proved, or at least claimed." Upon this it may be observed, 1st, That in the cases of *Harley v. Greenwood*, and *Bridget v. Mills*, the creditor was the holder of other bills at the time of his proof. 2dly, That the drawer in this case was not in a situation either to prove or to claim the outstanding bill, because such right was in the bill-holder; and, 3dly, That it is difficult to discover how the notice of dishonour can affect the question, as such notice is merely to enable the bill-holder to enforce his right against the drawer.

Mr. Ross and Mr. Chandless for the respondents: —

In *ex parte Crinsoz*, 1 Bro. 270, *ex parte Grosvenor*, 14 Ves. 587, and various other cases, it was held to be law of the Court, previous to the statute of the 40 G. 3. c. 121., that a creditor could not prove part of a simple contract debt and proceed at law for the remainder; and it cannot be supposed to have been the intention of the legislature that the provision of the 40 G. 3. c. 121. s. 14., which was intended for the ease of the bankrupt, should

operate to his prejudice, which would be the effect of the construction upon which the petitioner relies. In *ex parte Crinsoz*, Mr. Justice *Ashurst* said, that in any case it was hard that a creditor should both prove and bring an action even where the debts were distinct; but in this case the debts were not distinct, but arose upon an account for goods sold and delivered by *Edwards* to the bankrupt. In *ex parte Grosvenor*, Lord *Eldon* said, "If a creditor has a note for one sum, and a bond for another, as the remedies and the relief under those securities are different, he may prove the one debt, and hold the bankrupt in execution for the other; but he cannot split a demand for goods sold and delivered." In *ex parte Glover*, 1 Gl. & J. 270, the Vice-Chancellor (Sir *John Leach*) restrained a bill-holder from proceeding where the original creditor had claimed; and His Honour observed, that a distinct demand was a demand of a distinct nature, as of *indebitatus assumpsit* and bond. It is clear, therefore, that a creditor is not entitled to split a simple contract debt into two, so as to prove for one part, and proceed at law for the other.

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In *ex parte Dickson*, 1 Rose, 98, Lord *Eldon* said, that the 49 Geo. 3. c. 121. s. 14. was a remedial law, and must receive a liberal construction, an observation which applies with equal force to the 6 Geo. 4. c. 16. s. 50., which was clearly intended to prevent the bankrupt from being unnecessarily and oppressively vexed. Besides, this Court has a jurisdiction in such cases, which existed before and independently of the late act, and which ought not to be governed by the decisions at law. Lord *Eldon* frequently said he was not bound, being the supreme authority in bankruptcy, to take notice of the judges' opinions in courts of law.

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Mr. *Montagu* in reply : —

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Previously to the 49 Geo. 3. c. 121. it was the constant practice for a creditor to prove part of his debt, and to proceed at law for the residue; and the only remedy for the bankrupt was by a petition to compel the creditor to elect. He frequently did elect, by waiving his proof, and proceeding at law for the whole debt. To prevent this hardship the statute has enacted, that the proof shall be a conclusive election as to the sum proved, but it has not deprived the creditor of his legal rights with respect to any sum which he has not proved. In the case of *ex parte Glover*, 1 Gl. & J. 270., the debt was claimed, and for the very same debt the creditor had procured a third person to proceed against the bankrupt, so that it was virtually a proceeding at law by the creditor for the very debt which he had claimed.

Dec. 13. The case stood over for judgment until this day.

The LORD CHANCELLOR : —

This case is of considerable importance. It is important, not so much from the amount of property in dispute, as because it is essential to avoid the inconvenience and injustice which would arise, if, in the interpretation of a clause in an act of parliament, a rule of construction were permitted to prevail in this Court different from that which is recognized and followed in the courts of common law.

The material facts before the Court may be shortly stated : — The bankrupt became indebted to *Edwards* in a certain sum, on contract, for goods sold and

delivered, and shortly after this sale a bill for the exact amount was given in payment. There was then a second and distinct contract, for another parcel of goods, and soon afterwards a second bill was given by the bankrupt for the precise amount of this last purchase. The first debt was proved under the commission, but at the time of that proof the second bill was outstanding in the hands of a party to whom it had been assigned for valuable consideration. It had, however, been dishonoured, and due notice given of the dishonour. Afterwards this bill was returned to *Edwards*; and he, in January 1827, commenced an action upon it, against the bankrupt, in the Court of King's Bench.

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The bankrupt then applied to Mr. Justice *Hobroyd* to stay the proceedings in the action; which being refused, he presented a petition to this Court, and obtained an order from the Vice-Chancellor, restraining the plaintiff *Edwards* from further prosecuting the action in question.

Against the order so made, the present appeal has been preferred.

The question turns upon the construction of the 59th section of the late bankrupt act, which was re-enacted, with certain additions from the 49th Geo. 3. c. 121. s. 14. This clause applies to two distinct classes of cases: first, where an action has been commenced previously to the application to prove; secondly, where a party has not commenced an action at the time of his proving or claiming, in which case the proof or the claim is declared to be an election for the sum proved or claimed. Under the first part of the clause no difficulty can arise, for it is clear that the proof of a debt, in respect of which

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debt an action has been previously brought, operates as a relinquishment of the action. But the case now before me depends upon the construction of the second part of the clause, which provides that "the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed. Nothing can in my opinion be more precise and distinct than these words; and if this question were now for the first time agitated, I should adhere, without hesitation, to the distinction between the two classes of cases, which seems to me to be so clearly stated in the statute itself. But such not being the case, it becomes necessary to examine and consider what has been decided by the courts of common law, and likewise by this Court, as to the true construction of the clause in question.

In the case of *Watson and Meden*, 1 B. & A. 121, which came before the Court of King's Bench, in the year 1871, when Lord *Ellenborough* was Chief Justice, the circumstances were nearly the same as in the present case. There were two distinct parcels of goods furnished at two different times, and a bill of exchange was given for each parcel. The debtor having become bankrupt, proof was made for the amount of the first parcel. The bill for the other parcel was not due at the time of this proof, and was outstanding. It was afterwards returned dishonoured, and an action was brought upon it. A motion was then made to stay the proceedings; and although, under the circumstances, it was not absolutely necessary to consider the operation of both clauses, Lord *Ellenborough* and Mr. Justice *Abbott* expressly adverted to both. The result, therefore, of

Watson and Meder, is, that two of the Judges were of opinion, that the effect of proof was an election only as to the distinct debt proved.

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The next case, *Harley v. Greenwood*, 5 B. & A. 95, was decided in 1821. Here there were four or five distinct contracts for different parcels of goods, for which as many distinct securities, applicable to each contract, were given, all of which were due at the time one of them was proved under the commission. The application was not to stay proceedings in the action. The circumstance of one bill having been proved was pleaded in bar to the action on the other bills. The two points considered were, first, whether the proof could be pleaded in bar; and, secondly, if it could, whether it would extend beyond the one debt actually proved. All the Judges were of opinion, that if it could be pleaded in bar at all, it could only be as to the particular debt proved; and that, as to the other distinct debts, the creditor might proceed at law for their recovery. The bills, it appears, were not given for one entire debt, but in payment of distinct sums due for several parcels of goods; and I think this case decided that distinct contracts, whether upon bills of exchange or in respect of goods sold, are to be considered as creating distinct and separate debts.

The same question came before the Court of Common Pleas, in *Bridget v. Mills*, 4 Bing. 18, where the Judges considered it to be clear that the proof of one debt did not prevent an action being maintained for another debt, unconnected with the debt proved; and the effect of their decision was further, that two distinct contracts, for distinct parcels of goods, were to be considered as creating distinct debts.

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The case now before me has also virtually been carried before the Court of King's Bench; it was submitted to one of the Judges of the Court, and the parties, being dissatisfied with the opinion of that Judge, might have appealed to the whole Court.

Such, then, have been the uniform decisions in the courts of common law; and it remains only to be considered, whether there is any real difference in the construction of the statute adopted by this Court. The first case was *ex parte Dickson*, 1 *Rose*, 98, where two bills of exchange were given, one for 92*l.* and the other for 100*l.* An action had been brought on the bill for 100*l.* previously to the bankruptcy, and the bankrupt taken in execution. Afterwards, the creditor proved under the commission the bill for 92*l.*, and this was considered a relinquishment of the action. It certainly was so, being within the words of the first part of the 40 Geo. 3. c. 121. s. 14; and Mr. J. *Abbott*, in *Watson v. Medex*, expressly notices this distinction.

In *ex parte Glover*, 1 *G. & J.* 270, an action was brought in the name of *Walsh*, on a promissory note for 240*l.*, but the name of *Walsh* was used for that of *Lloyd*, and the action was in fact the action of *Lloyd*. On the 6th of April 1821, the bankrupt was arrested; and on the 21st of April *Lloyd* claimed under the commission, which, as *Walsh* and *Lloyd* were identified, was, under the first part of the clause, considered a relinquishment of the action. The next case, *ex parte Hardenburgh*, 1 *Rose*, 204, was also a decision under the first part of the clause.

Then came the case of *ex parte Sly*, 2 *Gl. & J.* 163, which was similar in many respects to the present.

There was '160*l.* due to *Oxley*, on a running account, for goods sold and delivered at different times. Two bills, one for 78*l.*, the other for 55*l.* 18*s.*, were given by the bankrupt to *Oxley*, who proved for 109*l.* 19*s.* 2*d.*, exhibiting one of the bills as a security. The other bill he had assigned, but after the proof it became due, was returned to him dishonoured, and an action having been commenced upon it, the present Master of the Rolls was of opinion, that he ought not to restrain the action, as *Oxley*, by the re-assignment of the bill to him, became a creditor of the bankrupt upon an entirely new debt, and his action at law was not, therefore, a proceeding for the same demand for which the proof was made. This case, then, is clearly not in opposition to the decisions of the courts of common law. And the same learned judge, in *ex parte Glover*, 1 Gl. & J. 270, (which I ought to have adverted to before,) observed, that the statute did not apply to actions for distinct demands brought subsequent to proof or claim. He is, indeed, reported to have said that a distinct demand was a demand of a distinct nature, such as *indebitatus assumpsit* and bond; but it was altogether unnecessary to make that statement, and it must, therefore, be considered as an *obiter dictum* — an *obiter dictum*, certainly, of a judge of great learning and experience, but to which I cannot assent, for I am of opinion, that to constitute distinct debts, it is not requisite that they should be of different natures, but that it is sufficient if they arise upon distinct contracts.

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This review of the cases, therefore, warrants my saying, that the Courts have not hitherto differed in the construction of the clause in question; and my deliberate opinion is, that the decisions of the Courts of common law — of courts differently constituted, as respects the

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judges, at the different times when the cases were decided — ought to be confirmed.

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In the present case, there are two distinct debts for two distinct parcels of goods, in respect of which two distinct bills were given; and I think the party might have proved the amount of one of the bills under the commission, and have afterwards proceeded at law for the amount of the other bill, even if he had been the holder of that bill at the time of his proof for the amount of the first. It is not necessary, therefore, to advert to the observations which have been made upon the circumstance of one bill being outstanding, and notice given of its dishonour. The order of the Vice-Chancellor must be reversed.

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Ex parte CHAMBERS. — In the matter of A. H. CHAMBERS the elder and A. H. CHAMBERS the younger.

Where A., having proved a debt under a commission against B., brought an action and obtained judgment against B. for the amount so proved, a sum attempted to be proved, and other sums advanced after the bankruptcy, and upon this judgment sued out execution, and caused property of B., in the possession of his assignees, to be taken in execution, the Court ordered the execution to be withdrawn altogether: Quere, whether the Court would have so interfered if the judgment and writ of execution had not included the sum proved under the commission.

THIS was a petition of appeal from the judgment of the Vice-Chancellor. The material facts of the case, and the principal arguments urged at the bar, are stated in the report of it in 2 Gl. & J. 381.

Mr. *Pepys*, Mr. *Knight*, and Mr. *J. Russell*, in support of the appeal, referred to the cases cited in the

Court below, and also to *ex parte Callow*, 3 Ves. 1. 1828.
Ranken v. Horner, 16 East, 191.

Mr. Sugden and Mr. Griffith Richards *contra*.

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The LORD CHANCELLOR:—

This case arises out of the bankruptcy of Messrs. *Chambers* and Son. It is an appeal from the decision of the Vice-Chancellor, and now stands for the judgment of this Court.

The facts are these: *William Chambers*, the brother of *A. H. Chambers* the elder, proved, under the commission, a debt of 36*l.* 7*s.* 8*d.* against the joint estate, and 3,794*l.* 2*s.* 6*d.* due on a promissory note, which, with interest, amounted to the sum of 4,027*l.* 9*s.* 7*d.*, against the separate estate of *A. H. Chambers* the elder. He further proposed and offered to prove against the same estate a sum of 698*l.*, due on another promissory note; but the commissioners refused to permit this proof, in consequence of his holding securities, which he was unwilling to relinquish.

After he had thus proved the first debt, *William Chambers* brought an action against his brother for the amount proved, the sum attempted to be proved, and other sums due upon promissory notes, or alleged to have been advanced after the bankruptcy. This action was commenced in the Court of Exchequer, and no defence being made, judgment was suffered by default for the whole amount sought to be recovered. A writ of execution was then sued out, and indorsed, to levy a sum of more than 6,000*l.*, which included the sum proved, the sum offered to be proved, and the sums sub-

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sequently advanced. Upon this execution, so sued out and so indorsed, the sheriff took in execution property that formerly belonged to the bankrupt *A. H. Chambers* the elder, but which was then in the possession of the assignees.

Under these circumstances, a petition was presented to the Vice-Chancellor, and an order was, in consequence, made, that *William Chambers* should direct the sheriff to withdraw from the possession of the property seized, and re-deliver it to the assignees. Against this order the present appeal has been preferred.

According to the opinion expressed by the Court, on a recent occasion, if *William Chambers* had confined his action to the debts which had not been proved under the commission, the Court would not, as they were distinct debts upon distinct contracts, have considered itself called upon to restrain him from proceeding in the action. That would have been in accordance with the opinion I lately expressed in the case of *ex parte Edwards (a)*, to which I fully adhere. On the other hand, if the action had been brought, judgment obtained, and execution sued out on the debt actually proved under the commission, and the sheriff had taken in execution the goods of the bankrupt in the hands of the assignees, the Court would and ought to have interfered; for as regards the debt proved, the proof is an election to take under the commission, and the party can have no right to seize in execution property in the hands of the assignees.

In this case, both causes of action were united. The petitioner united the sums that he had proved under the

(a) *Ante*, page 124.

commission, and those which he had not proved, including what had been advanced by him after the bankruptcy. Assuming that if he had confined his action to the debt not proved under the commission, and had accordingly sued out execution against the goods of the bankrupt for that debt alone, the Court ought not to have interfered; assuming this, (for I desire that I may not be understood as expressing any opinion upon the point,) it becomes material to consider what is here the actual state of the case. In this action Mr. *William Chambers* has thought proper to include both what was and what was not proved; and it is under such circumstances that I am now to determine what course it is proper to pursue, and what order it becomes the Court to pronounce.

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It was said at the bar, that the Court might make a qualified order — an order restraining the execution as to the debt proved under the commission, but leaving the execution in force as to the remainder. The form of such an order was not, however, suggested, nor were the difficulties likely to result from it examined or considered. If an application had been made to the Court of Exchequer to stay the proceedings as to part of the cause of action, that Court could not have made such an order; or if it be said that the Court of Exchequer might have ordered a *nolle prosequi* to be entered as to the sum proved, a question would arise, whether such an order would be consistent with the 6 Geo. 4. c. 16. s. 59., by which it is provided, that any creditor who shall have elected to prove or claim, if the commission be afterwards superseded, may proceed in the action as if he had not so elected. A right is given him to proceed in his action, previously relinquished; but by entering a *nolle prosequi*, that part of the action to which it applied

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would be extinguished, and could not afterwards be proceeded on, so that the party would be compelled to begin *de novo*, which is inconsistent with the language of the statute

The only course, then, would be for the Court to stay the proceedings altogether, leaving the party to alter his own record so as to get rid of the existing objection, and to apply for another writ of execution to the sheriff. These difficulties, it is to be remembered, are difficulties created by Mr. *William Chambers* himself, and he is not entitled to complain that the Court will not take them upon itself. He must be left to deal with his own record in the Court of Exchequer, as he may be advised. It is not for this Court to suggest the course which he ought to pursue; but if he should succeed in getting rid of the difficulty, and should, upon a new writ, take the goods of the bankrupt in execution, he may come here again, and it will then be for me to decide the more important question, whether, when a party has proved for one debt under a commission, and brings an action and recovers judgment for a distinct debt, he has a right to take in execution the goods of the bankrupt in the possession of the assignees. That point it is unnecessary for me to determine at present. I am anxious not to express any opinion upon it. But as the case now stands, I am bound to decide that the execution must be withdrawn altogether; and it is on this ground, and on this ground only, that I affirm the order of the Court below.

Petition of appeal dismissed, with costs.

Ex parte MINCHIN. — In the matter of MINCHIN,
CARTER, and KELLY.

V. C.
LINC. INN,
January 13,
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THIS was a petition by the bankrupt *Minchin*, stating that he had paid 20*s.* in the pound on his separate estate, from which a surplus was carried to the joint estate, on which 12*s.* 6*d.* in the pound had been paid, and praying that he might be declared to be entitled, to his sole use, to an allowance of 5*l.* per cent. not exceeding 400*l.* Upon the separate estates of the other partners, *Carter* and *Kelly*, a sufficient dividend had not been paid.

Where A., being one of three partners, had paid 20*s.* in the pound on his separate estate, and 12*s.* 6*d.* in the pound had been paid on the joint estate, but on the separate estates of the two other partners a sufficient dividend had not been paid: Held, that under the 6 Geo. 4. c. 16. A. was entitled, for his sole use, to an allowance of five per cent. not exceeding £400.

The allowance is not payable until a final dividend has been made.

Mr. Sugden and *Mr. Wright* for the petition : —

The question which this petition presents for the consideration of the Court is, whether *Mr. Minchin* is not entitled to the allowance claimed, without reference to his partners. Lord *Thurlow*, indeed, decided against a similar demand in *ex parte Bate*, 1 Bro. C. C. 453., but the propriety of that decision has always been doubted. For the purposes of this argument, however, it is not necessary to question the authority of that case, because we rely upon the construction of a clause in the late bankrupt act, which differs materially from the 5th Geo. 2. c. 30. s. 7., by the strict words of which, after much hesitation and with evident reluctance, Lord *Thurlow* admitted that he was bound. A comparison of the clauses in the two acts will shew, that the recent enactment upon the subject must have been intended to alter a rule that operated most unjustly, and which had the effect of confounding

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In the 6 Geo. 4. c. 16. s. 128. the words are, "every bankrupt shall be allowed five per cent.," &c., whilst in the 5 Geo. 2. c. 30. s. 7. they are, "all and every person

(a) By the 5 Geo. 2. c. 30. s. 7. it is enacted: "That *all and every person and persons so become or to become bankrupts* as aforesaid, who shall within the time limited by this act surrender him, her, or themselves to the acting commissioners named and authorized in or by any commission of bankrupt awarded or to be awarded against him, her, or them, and in all things conform as in and by this act is directed, *shall be allowed the sum of five pounds per centum out of the net produce* of all the estate that shall be recovered in and received; which shall be paid unto him, her, or them by the said assignee or assignees of the said commissioners, in case the net produce of the said estate, after such allowance made, shall be sufficient to pay the creditors of the said bankrupt, who have proved their debts under the said commission, the sum of ten shillings in the pound, and *so as the said five pounds per centum shall not amount in the whole to above the sum of two hundred pounds, &c.*

By the 6 Geo. 4. c. 16. s. 128., it is enacted: "That *every bankrupt* who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, *shall be allowed five per cent. out of such produce*, to be paid him by the assignees, *provided such allowance shall not exceed four hundred pounds,*" &c.

And by section 129, "That in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance."

and persons so become or to become bankrupts, shall be allowed the sum of 5l. per centum," &c. — expressions which fettered Lord *Thurlow*, and led him to the conclusion that several partners were to be regarded as one, so far as respected their right under the statute to an allowance. But if any doubt can exist as to the true construction of the 128th section, it must be removed by section 129, which was evidently framed with reference to *ex parte Bate*, and to alter the injustice of the practice founded on that decision.

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In the same spirit of legislation, it will be seen, on reference to the 130th section, that each bankrupt is now to be considered as standing alone and independently, and liable to punishment or forfeiture for his own misconduct or irregularities, but not for those of his partners in trade. By the late act a new and most beneficial rule was introduced, and there is nothing to contradict the clear and express meaning of the words in the clauses to which reference has been made.

If the other partners, *Carter* and *Kelly*, become entitled, and apply hereafter for their several allowances, the total amount will still fall far short of five per cent. upon the sum already divided amongst the creditors.

Mr. *Montagu* for the assignees: —

By the 5 Geo. 2. c. 30. s. 7., the law previous to the present bankrupt statute, it was enacted: "That all and every person and persons so become or to become bankrupts, who shall be allowed the sum of five pounds per centum out of the net produce of all the estate that shall be recovered in and received." The true interpretation of

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this clause was decided by Lord *Thurlow*, after great deliberation, to be, that the joint and separate estates were not to be considered distinct, as if two commissions had issued, but as consolidated, and that only one allowance should be payable. *Ex parte Bate*, 1 Bro. 458. (a) And in *ex parte Powell*, 1 Mad. 70, the Vice-Chancellor says: "From that decision (*ex parte Bate*), which I consider binding on me, I conclude, that in determining the question of allowance, the joint and separate estate are not to be considered as distinct, and as if two commissions had issued; but only one allowance is made."

With respect to the doctrine of *ex parte Bate* being doubted by the profession, because if three separate

(a) In *ex parte Bate*, in *re Bate and Henckel*, the first question made was, whether the petitioner could have two allowances, the one in respect of the separate, the other of the joint estate; but the Lord Chancellor was clearly of opinion this could not be. The next and principal question was, whether *Henckel* was entitled to any allowance; and if so, whether the same should be part of the 800*l.* to which the petitioner would be entitled.

The Lord Chancellor "thought the proper way of considering the question would be, taking the debts as well as the effects in moieties. *Bate*, therefore, having paid in fact above 20*l.* in the pound on the moiety of the debts, though not quite 15*l.* on the whole, was entitled to the full allowance; but *Henckel*, who had not paid 10*l.* upon his moiety, was entitled to nothing. But this opinion his Lordship afterwards changed; for a few days after he declared that the bankrupts were entitled under the act of parliament to the sum of 800*l.*, being an allowance of ten per cent. in respect of their joint and separate effects; and that the same ought to be divided between them, according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts."

commissions were in operation each bankrupt would be entitled to his full allowance, and that, because the commissions are for the convenience of the creditors consolidated, the bankrupts ought not to be prejudiced, it is too late to inquire whether any and what weight is due to these doubts; and we cannot suppose that reasoning so obvious did not present itself to the mind of Lord *Thurlow*, who, upon a careful examination of the words of the statute, determined, that under a joint commission such right to more than one allowance does not exist. But even supposing Lord *Thurlow's* opinion to be erroneous, it is not, after the law has been settled for fifty years, and the practice in obedience to it, for the Court to disregard all previous decisions, and to exercise its own judgment upon what it may suppose the Court ought originally to have determined. This alteration can now be effected only by the interposition of the legislature. There is scarcely any judge who has not expressed his disapprobation of *Russel v. Russel* (a); but no one has ever thought it right not to consider the decision in that case as settled law.

If the petitioner, therefore, has any right, it must be under the words of the 6 Geo. 4. c. 16. ss. 128 and 129. But the words of the new act (b) are not so strong in favour

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(a) 1 Bro. C. C. 269. See *ex Warner, 1 Ross, 286; ex parte Coming, 9 Ves. 117; ex parte Hooper, 1 Merivale, 7, &c. Hely, 11 Ves. 405; ex parte Finden, 11 Ves. 404; Norris v. Wilkinson, 12 Ves. 192; ex parte Mountfort, 14 Ves. 606; ex parte Coombe, 17 Ves. 370; ex parte Whitbread, 1 Rose, 298; ex parte*

(b) It is important to observe, that by the 6 Geo. 4. c. 16. s. 128: the bankrupt's allowance was increased to double its former amount. See note to *ex parte Davis, ante, page 98.*

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of a distinct allowance to each bankrupt as the words of the old act; for in the 5 Geo. 2. c. 30. s. 7. the words are "all and every," and in the late act the word "all" is omitted, and the only word used is "every," &c. As far, therefore, as the words can be supposed to alter the law, it is in diminution of the right of the bankrupt. Now, as it has been said that the doctrine of *ex parte Bate* has been long doubted by the profession, is it reasonable to suppose that, if the legislature had intended to alter the law, it would have been by this general statement, instead of by a specific enactment? A similar inference was noticed by the Lord Chancellor, in the course of the argument upon the construction of another clause of the statute, on an appeal in the case of *ex parte Edwards*. (a)

That the legislature, if it had intended thus to alter the law, would have expressed its intention by clear and specific enactment, may also be inferred from section 129 of the same statute. It was settled in *ex parte Powell*, 1 *Mad.* 68, that a bankrupt who had obtained his certificate and paid the statutable amount of dividend, could not claim the allowance, unless his partner was also entitled, the allowance being only jointly claimable. This hardship, by which the innocent was punished for the guilty, the legislature thought it right to remedy; and, so thinking, it did not express itself by vague and general words, but by the specific enactment contained in the 129th section. That section was framed with reference to *ex parte Powell*, and not to *ex parte Bate*. It is clear, therefore, that the law

(a) *Ante*, page 116. See *ex parte Burgess*, 2 *Gl. & J.* 199.

as it existed previous to the 6 Geo. 4. c. 16. remains unaltered.

1829.

The VICE-CHANCELLOR: —

Ex parte
MINCHIN.
In the matter
of
MINCHIN
and others.
Jan. 20.

With reference to this petition, it appears to me that my decision must be governed by the words of the late bankrupt act. These, it will be observed, differ materially from the words in the 5 Geo. 2. c. 30. s. 7., on which Lord *Thurlow's* decision in *ex parte Bate* was founded. (The Vice-Chancellor here referred to the 5 Geo. 2. c. 30. s. 7. and the 6 Geo. 4. c. 16. ss. 128 and 129.) Considering these clauses together, and particularly the concluding words of the 129th section, "he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance," that is, not entitled for any reason whatever, I cannot but think that the legislature contemplated the separate payment of each partner's allowance. Finding a material departure from the words of the 5 Geo. 2. c. 30. s. 7. in the new bankrupt act, and applying my mind to the construction of the clauses in question according to the usual meaning of words in the English language, I am bound to decide that each partner is entitled to his separate allowance, and that the prayer of this petition ought to be granted.

I understand it to be admitted at the bar, that a final dividend has been made. I make this observation, because in the case of *ex parte Davis*, in the matter of *Barlee*, where I ordered the bankrupt's allowance to be paid, I proceeded on the authority of *ex parte Safford*, 2 Gl. & J. 128, which was cited at the bar, but in which

1829.

—
Ex parte
MINCHIN.
In the matter
of
MINCHIN
and others.

case, I have been since informed, that the dividend had been advertised as a first and final dividend. (a)

Ordered according to prayer of petition.

(a) *Ante*, page 36.

23d December 1828.

The Vice-Chancellor stated that, in conference with the Lord Chancellor, it had been determined by his Lordship that the Vice-Chancellor may direct a petition to be heard before the day of petitions for which it had been answered; and that the rule stated in *ex parte Charlton*, 2 Gl. & J. 390., having been productive of inconvenience, must be altered.

1. The first part of the paper discusses the importance of the study of the history of the United States. It is argued that the study of the history of the United States is essential for a full understanding of the country and its people. The paper then discusses the various methods used by historians to study the history of the United States, including the use of primary and secondary sources, and the use of statistical methods. The paper concludes by discussing the importance of the study of the history of the United States for the future of the country.

ORDERS IN BANKRUPTCY.

*LETTER addressed by the SECRETARY of BANKRUPTS to the
Lists of COMMISSIONERS in London.*

GENTLEMEN,

Quality Court, Nov. 20, 1828.

It having been communicated to the Lord Chancellor, that considerable diversity of practice existed amongst the different lists of Commissioners of Bankrupts, as to the costs allowed in the taxing of bills for proceedings under commissions of bankrupt, and that a schedule of such costs, as should in general cases be allowed, would be extremely useful, his Lordship referred the subject to four experienced Commissioners for their consideration. The attention of one of those gentlemen, Mr. Pensam, was, from severe indisposition, interrupted before the business was completed; but the other gentlemen have reported to his Lordship as follows:—

“ In obedience to your Lordship's instructions, we have taken into our consideration the costs incident to proceedings under commissions of bankrupt, and we have prepared two tables, annexed to our report, ascertaining the costs which we submit as proper to be allowed to the solicitor and to the messenger.

“ In the course of our inquiry we have been attended by solicitors of experience and respectability, and by all the messengers; and we beg to lay before your Lordship a concise statement of the principles by which we have been guided in forming our conclusions. The order of the 26th of February 1807 having regulated the costs of solicitors in general business, we have, in every instance to which they are applicable, adopted the pro-

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L

visions of that order ; in other instances we have endeavoured to ascertain a reasonable compensation for time actually employed, according to the ordinary rate of professional remuneration ; conceiving that while on the one hand fictitious or exaggerated charges should be rigorously excluded, on the other, the scale of fees ought not to be reduced so low as to deter practitioners, established in general practice, from undertaking a department of their profession, where integrity and skill are not less useful, nor less requisite, than in any other.

“ The proceedings, prior to the choice of assignees, are so uniform in all bankruptcies, that few cases will, we believe, occur, for which a provision may not be found in the proposed table. In reference to the subsequent proceedings, we have endeavoured to provide for ordinary occurrences, and to supply some general rules, the application of which, in extraordinary cases, must be left to the discretion of the Commissioners ; with this caution, that their discretion be confined to the subject of charge ; but the rate should always be conformable to the table, wherever the table assigns a rate applicable to the occasion.”

In consequence of the above report, the Chancellor has desired me to enclose copies of the tables referred to, and to which his Lordship recommends the different lists of Commissioners of Bankrupts to conform in the taxing of bills which may hereafter come before them.

I have the honour to be,

Gentlemen,

Your obedient humble servant,

FRANCIS BARLOW,

Secretary of Bankrupts.

TABLE I.

SOLICITOR'S BILL OF COSTS.

SECTION I.

*Solicitor's Bill of Costs prior to and including the Choice of Assignees. **

	<i>£</i>	<i>s.</i>	<i>d.</i>
INSTRUCTIONS for commission, including attendances relative to petitioning creditor's debt.....	1	0	0
Attending and examining witnesses relative to the trading and act of bankruptcy.....	0	13	4
Attending to search whether a prior docket has been struck.....	0	6	8
The preceding charges preclude any further costs of inquiry preliminary to the commission.			
Drawing and ingrossing affidavit of debt, exclusive of payment for oath	0	6	8
Attending to get the same sworn	0	6	8

* The commissioners intended it to be understood, that to every article of charge in bills of costs a date should be affixed, and that no charge for business unaccompanied by a date, nor any general charge for business not stated in detail, should in any case be allowed.

The commissioners also considered that the charge for drawing bills of costs, though frequently made, should not be allowed; first, because, under the order of February 1807, the charge is confined to taxation between party and party, (*Beames' Orders*, 470, n.) while the taxation before commissioners must be considered as made between solicitor and client; and next, because they thought it unreasonable that the preparation of the bill, being a proceeding for procuring payment to the solicitor, should be the subject of a charge against the client.

	£	s.	d.
Solicitor's fee on petition, viz. half the fee, the other half being included in the bill of the office of the secretary of bankrupts, where the petition is prepared.....	0	10	0
Solicitor's fee on suing out a commission, including necessary communication with the messenger	1	0	0

Commissioners' Fees on opening a Commission.

[In London, the three commissioners attending are, under the statute, entitled to £1 each, at each meeting. The solicitor is entitled to a like fee at each meeting, for himself and one clerk.]

At public meetings, extra clerks at the discretion of the commissioners, each clerk.....	0	5	0
Solicitor's fee on opening.....	1	0	0

No charge should be allowed to the solicitor for attendance at meetings of the commissioners prior to adjudication, where, in the judgment of commissioners, the adjudication has been prevented by negligence or want of due diligence in the solicitor or petitioning creditor.

Provisional assignment and counterpart.....	3	0	0
Parchment.....	0	10	0
Commissioners' fees on executing the same	3	0	0
Solicitor's fee	1	0	0

In deference to long-established custom, we have allowed to the solicitor a fee of £1 on every deed executed by the commissioners, but we do not understand the principle on which that fee is claimed.

Provisional bargain and sale and counterpart	3	0	0
Parchment.....	0	10	0
Commissioners' fees on executing the same	3	0	0
Solicitor's fee.....	1	0	0
Commissioners' fee on acknowledging the same	0	10	6
Solicitor attending thereon	0	6	8
Solicitor attending to get the same enrolled in Chancery, under statute 27 H. 8. c. 16. and for the same	0	6	8

TABLE OF COSTS.

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If the Enrolment is made in a Common Law Court.

	£	s.	d.
Solicitor attending at Judges' chambers for fiat, and to docket and carry in roll	0	6	8
Enrolling.....per folio.....	0	0	8

We see no necessity for any other enrolment than on the law side of the Court of Chancery, by which these additional attendances would be saved.

Where the property is situated in a register county, the usual fees on registration should be added.

Solicitor's fee, on filing memorandum with the registrar, pursuant to the statute 6 Geo. 4. c. 16. s. 96. in each instance	0	3	4
Attending with and for commission, adjudication, and assignment, to be enrolled under s. 96.	0	6	8
When necessarily entered at successive times, for each attendance	0	3	4
Assignment and counterpart	3	0	0

If after provisional assignment, £1 more.

Parchment.....	0	10	0
Commissioners' fees, on executing same	3	0	0
Solicitor's fee.....	1	0	0
Bargain and sale, and counterpart	3	0	0

If after provisional bargain and sale, £1 more.

Parchment.....	0	10	0
Commissioners' fees, on executing the same.....	3	0	0
Solicitor's fee.....	1	0	0
Commissioners' fee, on acknowledging the same	0	10	6

Attendances thereon, and on enrolment and registration, as before.

Letters, messengers, &c.	0	10	0
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We allow no fee for attesting the execution of the counterpart of the bargain and sale, and assignment, whether provisional or subsequent, conceiving that the execution of the counterpart forms a portion of the business of the meeting at which the original is executed, and that at the meeting the counterpart executed ought to be delivered to the commissioners, who will hold it as a security for the due administration of the property by those to whom it has been conveyed.

SECTION II.

Solicitor's Bill of Costs, subsequent to the Choice of Assignees.

	£	s.	d.
Portfolio for the proceedings	0	7	6
Draft of notice to parties, before or after the choice of assignees, not to part with property to any one but the assignees	0	5	0
Fair copies thereof, and service, each	0	5	0
Preparing a posting bill or advertisement for the apprehension of the bankrupt	0	5	0
Copies thereof for printer, each	0	2	6
Attending printer with a common or special advertisement	0	6	8

The like allowances for advertisements for creditors to send in their demands, and for payment of dividends, and for other ordinary advertisements where necessary, in the progress of the commission.

Special advertisements, drawing and copy, per folio* ...	0	1	0
Attending to appoint conference with counsel	0	6	8

To counsel conference fee, according to circumstances, and clerk.

Attending conference	0	13	4
Perusing papers, and taking instructions for brief to counsel to attend meeting	0	13	4
Drawing brief, per brief sheet.....	0	6	8
Copy..... ditto	0	3	4
Attending counsel with brief	0	6	8

* In defining the extent of professional documents, the commissioners have employed the ordinary terms "Folio and Brief-sheet." In the proceedings regulated by the order of the Court of Chancery, the folio contains ninety words; in proceedings in the Court of Exchequer, seventy-eight words; in all other instances, according to the practice of conveyancers, seventy-two words. It was not without reluctance that the commissioners adopted the length of documents as the measure of remuneration, but they were unable to devise any less exceptionable criterion.

TABLE OF COSTS.

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	£	s.	d.
Writing special letters, each	0	5	0
Writing general letters, do.....	0	3	6
Circular copies.....do.....	0	1	6
Attendances.....do.....	0	6	8
Attendances beyond one hour, at the rate per hour.....	0	10	0
Perusing and settling draft of deeds drawn by opposite parties, for purchases under the commission, including additions made on perusal, per skin.....	0	5	0
Attending to return drafts	0	6	8
Attending execution of deeds, by each party, other than commissioners, when separate.....	0	6	8
Drawing abstracts of title, per brief sheet.....	0	6	8
Fair copy of abstract, per brief sheet.....	0	3	4
Where there is a previous abstract, to the extent of that abstract, a fair copy only should be allowed, at per brief sheet	0	3	4
Examining deeds with abstracts, per hour.....	0	10	0
Perusing abstracts of titles, furnished by an opposite solicitor, for every three brief sheets	0	6	8
Instructions for deeds	0	13	4
Drawing deeds and fair copy, per folio	0	1	4
Attested copies, exclusive of stamps, per folio.....	0	0	6
Fair, or close copies, to be kept and filed with the proceedings, in all cases, per folio	0	0	4
Attending a sale of property, freehold, copyhold, or leasehold, in London	1	0	0

In the country, at the rate of £2 2s. per day, and expenses.

The like allowance on all necessary absence from London on the special affairs of the commission.

Making out a list of proofs of £20 and upwards, to enable the bankrupt to apply for his certificate, per folio.....	0	0	6
Attending the commissioners with the proceedings, on their signing the bankrupt's certificate, and making a memorandum thereof, to file with the proceedings	1	0	0

	£	s.	d.
Attending the assignees preparatory to declaring a dividend, and arranging their accounts in proper form for the commissioners	0	13	4
Fair copy of the assignees' accounts to be signed by them, and filed with the proceedings, if made by the solicitor, per folio	0	0	4
Attending the messenger to get a time fixed for the second and subsequent audits, and to acquaint the assignees	0	6	8
The declaration of dividend being made, either when the audit is fixed, or at the audit meeting, requires no additional charge.			
Attending the assignees, assisting in apportioning the amount of dividend to be paid to each creditor, and making lists accordingly, at per hour.....	0	6	8
Copy of the statement for each assignee, per folio	0	0	4
Attending and examining creditors' vouchers and securities on payment of dividend, and drawing receipts, for each receipt.....	0	1	0
If more than 20, according to the time employed, per hour	0	6	8
Attendance on the assignees generally in the progress of these matters, at per hour	0	6	8
Examining list of debts and dividends, comparing the same with receipts, and drawing a list of unclaimed dividends, and copy to be filed at the bankrupt office, under statute 6 Geo. 4. c. 16. s. 110. per folio	0	1	0
Attending assignees for signature thereto, and attesting the same.....	0	6	8
Attending to file the same	0	3	4

Where necessary to lay a Case before Counsel.

Attending the assignees, perusing papers, and taking instructions	0	13	4
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TABLE OF COSTS.

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	£	s.	d.
Drawing the case, per brief sheet	0	6	8
Fair copy.....ditto	0	3	4
Attending counsel with and for case	0	6	8
Copy of opinion for assignees, per folio.....	0	0	4
Attending them thereon	0	6	8

When a Petition to the Lord Chancellor is necessary.

Taking instructions for special petition	0	6	8
Drawing special or common petition, per folio.....	0	1	0
Copy to present, per folio	0	0	4
Copy for the Lord Chancellor, do.	0	0	4
Attending to present, and afterwards for the same	0	6	8
Copy for counsel, per brief sheet	0	3	4
Taking instructions for special affidavit.....	0	6	8
Drawing special or common affidavit, per folio	0	1	0
Attending, reading, and settling special affidavit	0	6	8
Or according to time, per hour	0	6	8
Engrossing affidavit, per folio	0	0	4
Attending deponent, reading over engrossment of special affidavit to him, and with him to be sworn	0	13	4
Attending deponent on common affidavit, and with him to be sworn	0	6	8
Attending to file affidavit, and afterwards for office copy	0	6	8
Search for counter affidavit	0	6	8
Attending for office copies thereof, and examining the same	0	6	8
Brief copies of petition, and of all affidavits for counsel, per brief sheet	0	3	4
Drawing observations and copy, per brief sheet	0	10	0
Attending counsel with brief	0	6	8
Attending court, petition in the paper, and not heard, per day	0	6	8
Attending court, petition in hearing, per day	0	13	4

TABLE OF COSTS.

	£	s.	d.
Attending settling minutes of order	0	6	8
Attending for order, and examining same	0	6	8

*Where a Meeting of Creditors is convened, under stat. 6 G. 4.
c. 16. s. 88 & 133.*

Attending the assignees and taking instructions on the subject of the meeting, and preparing resolutions to be submitted by the assignees to the creditors for their consideration	0	13	4
Attending the meeting, including drawing the memo- randum and resolutions of creditors, and fair copy for signature, solicitor and clerk.....	1	0	0

Where a sufficient Number of Creditors do not attend.

Instructing the messenger, by direction of the assignees, to apply to the commissioners for a meeting under the proviso in sec. 88.	0	3	4
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*On taking a Mortgagee's Account under the Order of 8th March
1794.*

Attending the creditor on his claim, and perusing his mortgage security and account	0	13	4
Instructing the messenger to apply to the commissioners, for a meeting to take the mortgagee's account, and sign order for sale.....	0	3	4
Settling particulars and conditions of sale, and exa- mining proof sheets	0	10	0
Solicitor attending sale under the order.....	1	0	0

*If the commissioners attend the sale, they are entitled to the fee of £1
each for such attendance.*

Where the Assignees are served with a Summons, to shew Cause why a Dividend has not been declared, and the Commissioners require the Attendance of the Solicitor.

	£	s.	d.
Attending with the assignees before the commissioners	0	13	4
Postage of letters and porters, according to circumstances.			

In case of Commitment by the Commissioners.

Preparing the warrant and fair copy, including attendance on the commissioners for signature, per folio	0	1	0
Attending taxing bill of costs, in those instances where it cannot be done at the audit, each meeting.....	1	0	0

J. BEAMES.
 CLEM' T. SWANSTON.
 THOS. METCALFE.

TABLE II.

MESSENGER'S BILL OF COSTS.

	£	s.	d.
Attending commissioners for appointment to open commission	0	6	8
Summoning and attending commissioners, at every meeting	0	10	0
Summons for witnesses when necessary, and personal service thereof, each.....	0	6	8
Fee on executing provisional assignment, or provisional bargain and sale, each	0	10	0
Warrant of seizure and duplicate	0	10	0
Executing the warrant at each place	0	13	4
Summons to bankrupt to surrender, and duplicate	0	5	0
Service of summons on bankrupt.....	0	6	8
Preparing advertisement for the Gazette, and copy, and attending with and for the same	0	6	8
Pens and paper at each public meeting.....	0	1	0
Fee on executing the assignment, or bargain and sale, after a provisional assignment or provisional bargain and sale	0	10	0
Possession from the day of execution of the warrant of seizure to the choice of assignees, and no longer, per day	0	5	0
Preparing warrant for bringing up the bankrupt from prison, attending commissioners to sign the same, and service on the gaoler.....	0	13	4
Attending commissioners to appoint meeting for second and subsequent audit where none has been appointed	0	6	8
The like for dividend	0	6	8

TABLE OF COSTS.

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	£	s.	d.
Summons for assignees to attend audit meeting.....	0	6	8
Attending commissioners to appoint private meeting and sign summons.....	0	6	8
Attending to receive instructions of the commissioners to summon assignees, to shew cause why they do not make a dividend.....	0	6	8
Preparing summonses, and serving same upon the assignees	0	6	8
Proclaiming the bankrupt when he does not surrender to the commission.....	0	3	4
Attending commissioners to appoint a meeting to take mortgagees' account.....	0	6	8

When there is a Sale at which the Commissioners attend.

Summoning and attending commissioners thereat.....	0	10	0
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In case of Commitment by the Commissioners.

Taking into custody and executing their warrant, mes- senger and men's attendance, with coach-hire and expenses	1	1	0
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If in execution of any of the business above mentioned, the messenger and his man, or either of them, shall be compelled to travel any considerable distance from London, we submit, that beside the above fees, and in addition to travelling and other necessary expenses, an allowance should be made for the time employed, at the following rate per day:

For the messenger	1	6	8
For his man	0	5	0

J. BEAMES.

CLEM' T. SWANSTON.

THOS. METCALFE.

DIGESTED INDEX

TO THE

CONTEMPORANEOUS CASES

DECIDED IN OTHER COURTS.

ACT OF BANKRUPTCY.

1. If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. *Bleasby v. Crossley*, 2 C. & P. (N.P.) 213.

2. If a trader give a bill of sale of his own will, and not on pressure or demand, but when he is in such a situation that he must be supposed to anticipate that a bankruptcy will in all human probability follow, it is, it seems, an act of bankruptcy. *Gibbins v. Phillips*, 7 B. & C. 529.

3. The affidavit upon striking a docket is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

4. A demand to a clerk of a creditor, who only asks to see the debtor, but does not ask for money, is an act of bankruptcy, if in fact the clerk

did, to the knowledge of the debtor, call for money. A demand at a late hour, after retirement to rest, is not an act of bankruptcy. *Hughes v. Gilman*, 10 B. M. 480; 2 Carr. & P. (N.P.) 32.

5. The act of bankruptcy may be committed after the trading has ceased. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

6. In an action by the assignees of a bankrupt communications made by the bankrupt to his attorney may be given in evidence to prove the act of bankruptcy, if the bankrupt consents; and it does not lie in the mouth of the defendant to take the objection to their disclosure. *Merle v. Moore*, 2 C. & P. (N.P.) 275.

ANNUITY.

1. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands and not to any other person, and his receipt only to be a sufficient discharge,

passes in A.'s bankruptcy to his assignees. *Graves v. Dolphin*, 1 Simons, 66.

2. The clauses in the 6 Geo. 4. c. 16. (ss. 54 & 55.) respecting annuities, has a retrospective operation. Before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners although the annuity was granted, and the grantor became bankrupt previously to September 1825. *Bell v. Bilton*, 4 Bing. 615; 1 M. & P. 574.

ASSIGNEES.

If, after a known act of bankruptcy, a person take possession of the stock in trade and continue the business, and after a commission has issued, he pay the balance upon the debtor and creditor account to the messenger, who duly pays and accounts to the assignee, by whom it is accepted, the assignees cannot afterwards treat him as a wrong doer, and maintain trover against him. *Brewer v. Sparrow*, 7 B. & C. 310.

BANKRUPT — DISPUTING COMMISSION.

If a person, against whom a commission of bankrupt is sued out, apply to a judge at chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is by so doing precluded from disputing the validity of the commission in a court of law,

but may apply to the great seal. *Watson v. Wace*, 2 C. & P. (N.P.) 171.

BANKRUPT — PRACTICE.

Bankrupt bringing an action to try the validity of the commission, cannot at the same time proceed with a petition to supersede it on the same grounds. *Ex parte Burgess*, Jacob, 559.

CERTIFICATE.

1. A bankrupt obtained his certificate on the 13th of November; the same day a *feri facias* was executed on his goods; the Court refused relief on motion. *Hanson v. Blakey*, 4 Bing. 493.

2. In May 1825, a plaintiff obtained a verdict for damages, subject to an award; and on the 7th of January 1826, a commission of bankruptcy issued against the plaintiff. On the 26th of January the arbitrator made his award, and ordered the plaintiff to pay a sum to the defendant, with the costs of the award and of the reference, which, on the 21st of April 1826, were taxed and judgment of nonsuit signed: Held, that the costs did not constitute a debt proveable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood*, 7 B. & C. 705.

3. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of next term, but before final judgment was signed, became bankrupt: Held, that final judgment, signed afterwards during

the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway v. Fisher*, 7 B. & C. 436.

4. A second commission, issued against a trader before a former commission has been disposed of, is a nullity; and where a bankrupt obtained his certificate under a second commission, issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission. *Till and another v. Wilson*, 7 B. & C. 684.

5. If the owner of bank stock give to a stock-broker a power of attorney to sell, with orders not to sell without directions, and the broker sells the stock without the knowledge of the owner, and conceals the sale till a commission issue against him, his certificate is not a bar to an action in tort. *Parker v. Crole*, 5 Bing. 63.

6. The Court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having, after the receipt of the money, become bankrupt, and obtained his certificate. *Ex parte Culliford v. Warren*, 8 B. & C. 220.

COMMISSION.

1. A trader, in a commission of bankruptcy issued against him, is described as a money scrivener only. It is, nevertheless, competent to a plaintiff to support the commission by proof of any species of trading, notwithstanding the omission of the general words, "dealer and chapman." *Smith v. Sandilands*, 1 Gow. 171.

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2. No objection can be taken to the validity of a commission of bankrupt, unless the requisite notice be given, although the objection appears upon the proceedings, and requires no evidence to support it. *Bevan v. Lewis, Stokes v. Whittaker*, 1 Simons, 376.

COMMITMENT.

1. Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between them and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Ex parte Baxter*, 7 B. & C. 673.

2. Where a party, committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must bear the expence of that proceeding. *Ex parte Baxter*, 8 B. & C. 344.

ENROLMENT.

The Court of Common Pleas has not authority, under the 6 Geo. 4.

M

c. 16. s. 96., to compel parties to enrol the proceedings under a commission of bankrupt. The application must be to the Lord Chancellor. *Johnson v. Gillett*, 5 Bing. 5.

EVIDENCE.

1. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees. Query, whether an admission, obtained by such compulsory examination, can be used as evidence in such an action? *Tucker and another v. Barrow*, 7 B. & C. 623.

2. The petitioning creditor's debt, trading, and act of bankruptcy, are sufficiently proved by the production of the commission and the proceedings under it, in a case where the defendant is not named as assignee on the record, provided no notice under the 49 Geo. 3. c. 121. s. 10. has been given by the plaintiff. *Rowe v. Lant*, 1 Gow. 24.

3. Examinations of parties before commissioners of bankrupt, unless obtained by imposition or under duress, may be received in evidence against them in actions by the assignees. *Robson v. Alexander*, 1 M. & P. 448.

4. If, upon an application made by the collector for the assignees to a debtor of the bankrupt, the debtor knowing that the collector came from the assignees, says, "I will call and pay the money;" such promise is an admission of the rights of the assignee, and renders it unnecessary to

prove the requisites in support of the commission. *Pope v. Monk*, 2 Carr. & P. (N.P.) 112.

5. In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623.

EXECUTION.

1. The sheriff having, under a *feri facias*, issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the *feri facias* until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing the goods, which consisted of the stock on a farm which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the *feri facias*. The Court refused to stay the proceedings in the action of trespass. *Bernasconi and others v. Fairbrother and another*, 7 B. & C. 379.

2. Where a creditor obtained judgment by *nil dicit* against a trader, and thereupon issued a *fi. fa.* under which the sheriff seized the goods of the trader, who afterwards and before the goods were sold committed an act of bankruptcy, upon which a commission issued, and he was duly declared

a bankrupt, of which the sheriff had notice; but, nevertheless, sold the goods, and paid over the proceeds to the execution creditor: Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received. *Quære*, Whether the sheriff was justified in selling the goods after notice of the bankruptcy? *Notley v. Buck*, 8 B. & C. 160.

3. A sheriff, who takes in execution the goods of a bankrupt, is liable in trover to his assignees, although he has no notice of the bankruptcy, and a commission has not been sued out at the time of execution. *Price and another v. Helyar*, 4 Bing. 597. and 1 M. & P. 541.

FRAUDS, STATUTE OF. EVIDENCE.

If a promise after the bankruptcy be without date, it has been doubted whether the actual date can be supplied by parol. *Hubert v. Moreau*, 2 Carr. & P. (N.P.) 530.

FRAUDS, STATUTE OF. SIGNATURE.

If a promise after the bankruptcy to pay a debt be only by the signature of an initial letter, semble that it is not a sufficient signature. *Hubert v. Moreau*, 2 Carr. & P. (N.P.) 530.

LIEN.

As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much, but as between one class of creditors and another there is not the same reason for favour. Per Best, *C. J. Jacobs v. Latour*, 5 Bing. 130.

LIMITATIONS, STATUTE OF.

A debtor to a bankrupt, when sued by his assignee, cannot set up the statute of limitations as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 2 C. & P. (N. P.) 91.

MESSENGER.

The messenger, under a commission of bankrupt, may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, though the party was since declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignees out of the estate. *Burwood v. Kant*, 2 C. & P. (N.P.) 123.

NOTICE TO DISPUTE BANK- RUPTCY.

If, in an action by the assignees, a plea of the general issue, without a notice to dispute the bankruptcy, is left at the office of the plaintiff's attorney, and on the same day; and before the time for pleading has elapsed, the defendant take away the plea, saying that there is a mistake in it, and shortly afterwards he de-

liver another plea with the notice attached, and he explain that the notice is added, it seems that it is sufficient. *Lawrence v. Crowder*, 1 M. & P. 511.

PARTNERS.

In August 1821, A. a trader, being indebted to B. and C., then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to B. alone, who knew that A. was then insolvent. In October A. committed an act of bankruptcy, and in November, at B.'s desire, he sent goods to the warehouse of B. and C. as a further security for the debt. In December B. and C. dissolved partnership, and the former afterwards received from A. several sums of money on account of the warrant of attorney, and also sold the goods towards satisfaction of the debt. A commission of bankruptcy issued against A. in January 1823, and in November of that year B. died: Held, that A.'s assignees might recover from C. the money paid by A. on the warrant of attorney, by an action for money had and received, and the value of the goods by an action of trover. *Biggs and others, v. Fellows*, 8 B. & C. 402.

PETITIONING CREDITOR'S DEBT.

Where A. deposits with B. goods to be sold, and on a sale being effected, the profits, after deducting the cost price, &c. are to be equally divided between them; but the loss, if any, is to be borne exclusively by A.; if B. effect a sale and receive the mo-

ney, the debt due from him to A. is sufficient to support a commission of bankruptcy against B. *Marson v. Barber*, 1 Gow. 17.

PREFERENCE.

A trader stopped payment generally on the 5th of January, and on the evening of the 6th sent a 100*l.* note to a particular creditor, saying it was to help him over his payments: Held, that such a trader, afterwards becoming bankrupt, his assignees might recover the money in assumpsit, although it appeared that at the time of payment a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because he being a party to it the payment operated *pro tanto* in his discharge. *Guthrie v. Crossley*, 2 C. & P. (N.P.) 301.

PROOF.

The statute 49 G. 3. c. 121. s. 14., which enacts that creditors, who shall have brought an action against the bankrupt shall not be at liberty to prove under the commission without relinquishing such action, extends to prevent a creditor who is suing two partners, from proving his debt under a separate commission issued against one. *Blannin and another v. Taylor and another*, 1 Gow. 199.

**PROOF OF JOINT DEBT
AGAINST SEPARATE ESTATE.**

In a creditor's suit for administering the assets of B., a joint creditor of A. and B. was permitted to prove, A. having become bankrupt, and it appearing that there were no joint assets of A. and B. *Cowell v. Sykes*, 2 Russell, 191.

REPUTED OWNERSHIP.

If A. let a house to B. with a covenant that the lease shall determine on B. committing an act of bankruptcy on which a commission of bankruptcy should issue. And by another deed of the same date, A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. become bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants. And if it be proved on the one side that several of the servants of B. and many of his customers knew that the goods belonged to A., and on the other side, several of B.'s creditors prove that they considered the goods to belong to B. and gave him credit on the faith of them, and that he acted as master of the house, &c. it will be for the jury to say whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them. *Hickenbotham v. Groves*, 2 C. & P. (N.P.) 492.

SET-OFF.

A. kept cash with M. & Co. bankers, and accepted a bill, drawn by one of the partners in the house of M. & Co. and indorsed by that partner to M. & Co., who discounted it, and afterwards indorsed it for value to S. Before the bill became due, M. & Co. became bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to A. When the bill became due, S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. & Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against A. as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and A., and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from M. & Co. at the time of their bankruptcy. *Bolland and others v. Nash*, 8 B. & C. 105.

SHERIFF.

A creditor had obtained judgment by default against his debtor, since the statute 6 Geo. 4. c. 16. s. 108., and the goods having been seized by the sheriff before, but not sold until after, an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. In *re Washbourn*, 8 B. & C. 444.

STOPPAGE IN TRANSITU.

If the consignee of goods, upon discovering his insolvency, gives notice to the wharfinger not to deliver the consignment, the goods remain in the consignor. *Bartram v. Fairbrother*, 4 Bing. 579.

SURETY.

The drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorsee, is not "surety for or liable for the debt" of that indorsee, within the meaning of the 49 Geo. 3. c. 121. s. 8. *Mayer v. Meakin*, 1 Gow. 183.

TRADING.

1. If a person get orders for coals, having no stock of his own, but buying them from those who have, and then sells them, with invoices in his own name, he is a trader, although he obtain the coals from a merchant, and has neither wharfs, lighters, nor carts of his own. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

2. If a middle man, between coal merchant and customer, get orders for coals, with which the merchant supplies the customer, and pay a commission to the middle man, this is not a trading by buying and selling. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

VARIANCE.

An indictment against a bankrupt, under statute 5 Geo. 2. c. 30. for not

making a full disclosure of his estate, should truly set out the notice requiring him to surrender. Therefore, where the indictment averred that the notice required the bankrupt to surrender, &c. pursuant to stat. 5 Geo. 2. entitled, &c. and on the production of the notice it appeared, that the title to the 49 Geo. 3. was substituted for that of the 5 Geo. 2.: Held, that the variance was fatal. *Rex v. Burraston*, 1 Gow. 210.

WARRANT.

A warrant under 6 Geo. 4. c. 16. s. 29. can only be granted by a magistrate to the messenger under the commission. *Sly v. Stevenson*, 2 Carr. & P. (N.P.) 464.

WITNESS.

1. Held, under 6 Geo. 4. c. 16. s. 33. that in order to justify the commissioners in issuing their warrant for the apprehension of a witness, to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was thereby required to attend, and that the question, whether the service of the summons was in that respect reasonable or not, was a question of fact to be submitted to a jury. *Semble*, that the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served. *Grocock v. Cooper* and others, 8 B. & C. 211.

2. A creditor of a bankrupt may

be asked questions, the answers to which cannot be open to the objection that they are swayed by interest, notwithstanding they may communicate information by which the commission may be sustained. Therefore, a creditor may be asked, if he has in his custody the bond on which the petitioning creditor's debt was founded; and if not, to whom he has

delivered it. *Binfield v. Turner* and others, 1 Gow. 202.

3. In an action for work and labour, an uncertificated bankrupt is a competent witness to prove that the employment of the plaintiff was by him and not by the defendant, by whom the debt has been paid to his assignees. *Wilson v. Gallaley*, 2 Carr. & P. (N.P.) 467.

A Discrepancy has arisen in the Progress of this Part, by noting the Sheets as of Vol. III. of the former Series, instead of Vol. I. of a new Series in continuation of that of Messrs. Glyn and Jameson, as stated in the Wrapper. This Difference, if passed unnoticed, might lead the Binder into Error.

CASES

IN

BANKRUPTCY.

Ex parte HORWOOD and another. — In the matter
of HORWOOD.

V. C.
Dec. 19,
1828.

THE petition of *M. Horwood*, (formerly *M. Clayton*,) the bankrupt's wife, and *M. A. Clayton*, an infant, stated, that in April 1816 *R. Clayton* assigned a leasehold messuage, and all his household furniture and other effects, to *J. Prestage*, upon trust for his own use during life, and after his death, for the use of his wife during her life, and after the death of the survivor, for the use of their daughter, the petitioner, *M. A. Clayton*; that *R. Clayton*, pursuant to the trusts, occupied the messuage, with the household furniture and other effects, until his decease on the 20th of October 1816, on which event the petitioner *M. Horwood* entered into pos-

A. assigned a leasehold messuage and household furniture to B. upon trust for the use of A. for life, and after his decease, for the use of C. his wife, for life, and after the decease of the survivor, for the use of their daughter D. A. occupied the messuage, with the furniture, until Oct. 1816,

when he died. In Oct. 1817, C., the widow, married E., who immediately took possession of the messuage and furniture, and continued in possession until Oct. 1828, when a commission of bankrupt issued against him.

In Oct. 1818, E. had procured B. to assign the messuage and furniture to him by a deed, which contained false recitals, and was in breach of the trust: Held, under these circumstances, on the petition of C. and D., that the furniture was not in the order and disposition of the bankrupt E., and that his assignees should be restrained from selling the same.

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 and another.
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session of the leasehold messuage, &c., and retained the same until the 6th of October 1817, when she married *J. Horwood*, who immediately took possession of the leasehold messuage and furniture, and continued in such possession until his bankruptcy; that on the 19th of October 1818, *J. Horwood* procured *Prestage* to assign to him the leasehold messuage, furniture, and effects, by a deed, reciting that, at the time of the death of the said *R. Clayton*, he stood indebted to various persons in the sum of 456*l.*, and was possessed of no other property, except the aforesaid leasehold premises and furniture, which had been valued at 450*l.*; that the said *J. Horwood* had requested *Prestage* to assign to him the leasehold premises for the remainder of the term, together with the furniture, &c., which he, *Prestage*, had agreed to do, upon *J. Horwood* paying all the debts due from the said *R. Clayton*, and upon his laying out and investing the sum of 75*l.* sterling in the books of the Governor and Company of the Bank of England, in the joint names of himself and *Prestage*, to accumulate for the benefit of *M. A. Clayton*, the daughter of the said *R. Clayton*, and also upon *J. Horwood* and *T. B. Glover*, as his surety, entering into a bond to indemnify *Prestage* in making such assignment to *Horwood*; and it was witnessed, that *Prestage* assigned the trust property and premises, “upon the trusts, and to and for the ends, intents, and purposes, upon and for which he, *Prestage*, ought to hold, possess, or stand interested in the same premises respectively, or which he would have held and been possessed of or interested in the same, under or by virtue of the said deed of gift, if these presents had not been made and executed.”

The petition further stated, that *Prestage* afterwards departed this life; that the statements contained in the

last-mentioned deed poll of the insolvency of the said *R. Clayton* were false, inasmuch as the said *R. Clayton* did not die insolvent, and the said *James Horwood* never paid any of the debts of the said *R. Clayton*, and never invested the sum of 75*l.*, or any other sum of money, according to his undertaking; that *Horwood* had occasionally sold part of the said household furniture and effects, and replaced the same, by purchasing new furniture and other effects, and that at the time of his bankruptcy about one moiety of the household furniture and other effects in the said leasehold messuage and hereditaments was the original property of *R. Clayton*, and the other moiety of the household furniture and other effects was by substitution subject to the said trusts; that on the 2d of October 1828, a commission of bankrupt issued against *Horwood*; that the said household furniture and effects were seized by the messenger, and that the assignees had advertised the same for sale.

The petition prayed that the assignees might be restrained from selling the said furniture and effects.

Mr. *Rose* and Mr. *Chandless*, for the petition, said, this case was determined by *ex parte Martin*, 2 *Rose* 331, and 19 *Ves.* 490, in which a testator had directed, that in case his son should carry on the testator's trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside therein, and have the use of it. The widow and son carried on the trade, and became bankrupt; and it was held that the furniture, &c., was not in the order and disposition of the bankrupts.

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Mr. *Sugden* and Mr. *Montagu* for the assignees :—

Ex parte
HORWOOD
 and another.
 In the matter
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When the case of *ex parte Martin* is considered with reference to all the cases upon the subject, it will appear, that although furniture may be settled in trust for the sole use of the wife, yet that if the trustee permit the husband to be reputed owner of the furniture, it will pass to the assignees under a commission. There is nothing in the nature of furniture which is to defeat the general operation of the bankrupt statutes.

The first case was *Jarman v. Woolloton*, 3 *Ter. Rep.* 618. There the furniture was settled in trustees for the separate use of the wife; and it was decided not to pass to the assignees under a commission against her husband. The reason is explained by *Buller J.*, who says, “the husband had not the order and disposition of this property with the consent of the real owner. The trustee was the legal owner, and he gave no consent for such purpose; and the wife’s possession, in the manner proved, is no evidence of fraud; for she was the agent for the trustee.” But in the present case the husband had the order and disposition with the consent of the real owner, for he was himself the real owner, and it cannot be contended that the wife was his agent.

The next case is *Lingham v. Biggs*, 1 *Bos. & Pul.* 82. It was not a case respecting husband and wife, but *Eyre, C. J.*, said, “I can suppose cases where a trustee for a married woman, permitting the husband to take possession of the goods and chattels, and to become reputed owner to all the world, may lose the goods in

consequence." But no case can be supposed stronger than the present, where the husband is himself in legal possession, without the intervention of any trustee, and has been in possession as reputed owner for many years. In the case of *Darby v. Smith*, 8 *Ter. Rep.* 82, the furniture of the wife was before marriage assigned to trustees, to permit the husband to enjoy, on condition that he should pay 800*l.* by instalments. The husband was permitted to remain in possession after many of the instalments were due, and until his bankruptcy. It was held to pass to the assignees. Lord *Kenyon* said, "I think the arbitrator has determined this case according to conscience and law. The plaintiffs were invested with a trust in certain goods for the benefit of children, and in breach of that trust suffered the bankrupt to remain in possession of them, without making those payments which he had engaged to do on behalf of the persons entitled, from the year 1791 down to the present time." Every word said by Lord *Kenyon* may be used in the present case. *Prestage* was invested with a trust, and in breach of that trust suffered the bankrupt to remain in possession, without making the payments which he had engaged to do on behalf of the persons entitled. The case of *ex parte Martin* has no analogy to the case now before the Court, as will be seen by reference to the circumstances, and to Lord *Eldon's* judgment.

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Ex parte
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The VICE-CHANCELLOR:—

I cannot distinguish this case from *ex parte Martin*; the sale must therefore be restrained, reserving the question, whether the right of the petitioners extends

1828. to the furniture purchased since the original settlement. (a)

Ex parte
HORWOOD
and another.
In the matter
of
HORWOOD,

Ordered accordingly. *Affirmed Nov. 24.*



V. C.
LINC. INN,
Jan. 20,
1829.

Ex parte DECHAPEAUROUGE and others.—
In the matter of TOMKINS and others.

Where, at the election of assignees, the major part in value of the creditors had been, accidentally, and without default on their parts, excluded from voting, a new choice of assignees was directed to be made.

THIS petition was presented by ten creditors of the bankrupts, claiming debts to the amount of 6,323*l.* 8*s.* 8*d.*, and prayed that the Court would direct the choice of assignees to be vacated, and a meeting of the commissioners called to proceed to a new choice. It appeared that, at the time appointed for the second meeting, the petitioners attended at the Bankrupt Court to prove their debts, and to vote in the choice of assignees, but that in consequence of a meeting, at the same hour, under another commission, in which the creditors and parties interested were unusually numerous, the room of the commissioners was completely filled, and the petitioners were either unable to obtain admission, or were prevented from approaching the commissioners to tender their proofs. It further appeared, that, in consequence of this accidental exclusion of the petitioners, the choice of assignees was made by three creditors only, who had proved debts amounting altogether to less than 700*l.*

(a) See *ex parte Dale, Buck*, the note to *ex parte Smith, Buck*, 365, and the cases collected in 152, &c.

Mr. *Bickersteth* and Mr. *Montagu* for the petition :—

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Without imputing improper conduct to any of the parties, or doubting the respectability of the gentlemen who were named assignees at the second meeting, we are entitled to say that there was substantially no choice, because the great body of creditors were excluded from exercising the rights that belonged to them, not from any error or default on their parts, but from the actual impossibility of approaching the place of election. They were present at the appointed time and place; they were desirous of voting; and it is not disputed that they constituted the major part in value of the creditors. The case falls within the principle laid down in *ex parte Hawkins*, *Buck*, 520, where the proofs of the principal creditors had been erroneously rejected by the commissioners, and the Court directed a new choice of assignees.

Ex parte
DECHAPEAU-
ROUGE
and others.
In the matter
of
TOMKINS
and others.

Mr. *Sugden* and Mr. *Wakefield* :—

This is a singular and unprecedented petition. It is not pretended that any contrivance was used to create a crowd. On the contrary, it is admitted that the obstruction was altogether accidental. It was the duty, therefore, of the creditors who were excluded, to have applied immediately to the commissioners, or to the messenger in attendance, and to have apprized them of the difficulty. The choice of the present assignees was a legal choice, and it cannot be a sufficient or reasonable ground for removing them, that some creditors were excluded from voting.

The VICE-CHANCELLOR :—

Under the act of parliament all creditors who have proved to the amount of 10*l.* and upwards, are entitled

1829. to vote in the choice of assignees, and a reasonable facility should be secured to them of approaching the commissioners to exercise their rights. In this case, it is clear from the evidence, without blame being imputable to any one, that there was a great degree of physical difficulty in entering the room, and that no person, who had not secured a place at the commissioners' table, could avail himself of his privilege of voting. I am of opinion, therefore, that there should be a new choice.

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Ex parte
DECHAPEAU-
ROUGE
and others.
In the matter
of
TOMKINS
and others.

Ordered accordingly.

L. C.
West. Hall,
Jan. 26,
1829.

Against this decision an appeal was presented to the Lord Chancellor; and his Lordship, upon the grounds stated by the Vice-Chancellor, confirmed the judgment of the court below.

Mr. Sugden and *Mr. Wakefield* for the appellants.

Mr. Bickersteth and *Mr. Montagu* for the respondents.



Ex parte ANDERTON. *Ex parte* MOULT and others. — In the matter of BARROW and GEDDES.

V. C.
LINC. INN,
Jan. 26,
Feb. 29,
March 13,
1829.

ON the 17th of September 1828, a commission of bankrupt issued against *Barrow* and *Geddes*, under which *Moult*, *Wright*, and others were chosen assignees.

Where a party had presented a petition in bankruptcy, seeking relief and benefit under a commission, in respect of a particular transaction, he was restrained by an order of the Court from putting in issue the validity of the commission, in an action commenced against him by the assignees in respect of the same transaction.

After the opening of the commission, the messenger, acting under the directions of the petitioning creditors, took possession of goods to a considerable amount which had been deposited by the bankrupts in the warehouses of *Anderton*, and, as the assignees alleged, subsequently to the act of bankruptcy.

It was also alleged by the assignees, that, after the act of bankruptcy, *Anderton* had sold a considerable quantity of goods deposited with him by the bankrupts, and had received and retained the produce, to recover which the assignees caused an action at law to be commenced against him.

On the other hand, it was contended by *Anderton*, that the goods seized in his warehouses were, at the time of the seizure, his own property, having been deposited with him by the bankrupts previously to their bankruptcy, to secure the repayment of various sums which he had *bonâ fide* advanced to them, and he accordingly commenced an action against the petitioning creditors, to recover the goods which had been so seized by their orders.

On the 29th November 1828, *Anderton* presented a petition, in the bankruptcy, praying that the goods

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Ex parte
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 of
 BARROW
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which had been deposited with him might be sold, and the produce applied in payment of the several sums advanced by him to the bankrupts; that he might be allowed to prove under the commission for the residue; that an account might be taken of the goods and property deposited with him, and of such parts thereof as had been seized by the assignees; and that the assignees might be restrained from proceeding with the said action at law, and from commencing any other action against him, in respect of these transactions.

On the 22d of December 1828, the assignees presented a cross petition, stating, amongst other things, that the right of *Anderton* to the goods deposited would be fully tried in the action brought by the assignees, as well as in the action commenced by him, and praying that *Anderton* might elect whether he would proceed with his action, or with his petition in the bankruptcy; and that in case he should elect to proceed at law, his petition should be dismissed with costs; but that in case he should elect to proceed with his petition, and abandon his action at law, then that he might pay the costs occasioned by such action, and that the hearing of his petition might be postponed until after the trial of the action commenced against him.

Jan. 13.

The petition of the assignees being this day brought on for hearing, it was contended by counsel for *Anderton*, that the action commenced by him was only brought to recover damages for the illegal mode in which the goods had been seized, and that it was not intended to try the right of either party to the goods deposited.

The VICE-CHANCELLOR observed that if *Anderton* would give an undertaking that the only question to be

tried should be the mode of taking or seizing the goods, he would not restrain him from proceeding with his action ; and *Anderton's* counsel having consented to this, an order was drawn up, stating that *Anderton* having by his counsel undertaken not to raise upon the trial of his said action any question touching the validity of the commission of bankrupt, or of his right to the goods seized by the messenger, and having by his said counsel undertaken to confine the question to be tried in such action to the single point whether the mode of taking the said goods was illegal, his Honour ordered that *Anderton* should be at liberty to proceed with his said action.

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Anderton being dissatisfied with the order so drawn up, on the consent of counsel, presented another petition, praying for a rehearing as to this order.

The assignees also presented a further petition, stating, that notwithstanding the order so drawn up by consent, *Anderton* had given notice of his intention, on the trial of the said actions, to dispute the petitioning creditor's debt and the act of bankruptcy, and submitting that *Anderton* had by his former petition of the 29th Nov. 1828 elected to come in and seek relief under the commission, and that he was not now entitled to dispute its validity. The assignees, therefore, prayed that it might be declared that *Anderton* had elected to come in under and take the benefit of the commission, and that he might be restrained from disputing its validity in either of the said actions at law.

On this day these petitions came on to be heard together. Feb. 29.

1829. Mr. *Sugden* and Mr. *Koe* for the petitioner *Anderton*:—

Ex parte
ANDERTON
and others.
In the matter
of
BARROW
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With respect to the order drawn up by consent of counsel, it is clear that the assignees cannot object to our present application for a rehearing, on the ground that they have been in any manner prejudiced by what has been done. In a recent case of *Furnival v. Bogle*, the Lord Chancellor thought it right to set aside certain terms of compromise which had originated with counsel, and which had been afterwards deliberately agreed upon by the solicitors. Here the assignees can sustain no injury from what has passed, and the petitioner ought not to be precluded from bringing again under the consideration of the Court the new and very important question, whether the mere presenting a petition, by a party who is defendant in an action at law, brought by the assignees, affords a sufficient reason for restraining him from putting in issue, in such action, the validity of the commission. The petitioner, *Anderton*, claims a balance after retaining all the goods deposited with him by the bankrupts; and it is now contended that, because he has petitioned the Court in order to obtain that balance, he ought to be restrained from proceeding at law in the action brought by him, and from trying the validity of the commission, in the action brought against him by the assignees; but certainly no previous case has ever been pressed to this extent.

There appears to be a prevailing opinion that a party cannot proceed at law and in this Court at the same time, but the reverse of this was decided in the late case of *ex parte Edwards*, *ante* page 116. By the 6 Geo. 4. c. 16. s. 59. it is provided that no creditor who has brought any action against the bankrupt shall

prove or claim under the commission, without relinquishing such action; and it is also enacted that the proving or claiming shall be deemed an election to take the benefit of the commission with respect to the debt so proved or claimed; but here the application to the Court was for liberty to prove a balance remaining, after setting off the value of certain goods deposited, whilst the questions to be tried at law are of an entirely different nature.

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It is not possible to produce any authority to shew that the mere presenting a petition, on which petition no order has been made, has ever been considered as amounting to an election to come in under the commission; and it will be still more difficult to establish, either by reference to cases, or on principle, that a defendant can be restrained from resorting to any lawful defence in resisting an action brought against him.

Mr. Agar, Mr. Rose, Mr. Knight, and Mr. Kenyon Parker for the assignees:—

The petitioner, *Anderton*, was absolutely bound by the order drawn up, on the consent of counsel, who appeared for him at the bar; and the rule of the Court, in this respect, is not only supported by numerous authorities, but is founded on the soundest principles. In *Bradish v. Gee*, *Amb.* 229, Lord *Hardwicke* said: “Where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really give his consent; but his remedy is against his counsel, &c.; but if such decree was by fraud and covin, the party may be relieved against it, not by rehearing or appeal, but by original bill. *Richmond v. Tallicur*; *Floyd v. Mansell*.” In *Northcote v.*

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Northcote (1702), *Colles*, P. C. 287, (a) it is stated, that where the decree or order appealed from is expressed to be made upon the appellant's own consent, an appeal from it would be dismissed; and in *Despard v. Ormsby* (1713), *Colles*, P. C. 459, it was determined that after a party has once agreed to certain issues to be tried, he shall not make the impropriety of those issues a ground of appeal. In *Gray v. Gray*, 2 *Roll. Rep.* 63, (K. B. Mich. 16 Jac.,) 3 *Vin.* 304, *Montagu*, C. J., and *Haughton* J., observed: "that the act of the attorney shall prejudice his master in the principal matter, for if he confess the action without the consent and will of the master, this shall bind his master; but otherwise it is in collateral matters;" and per *Doderidge*, J. "the act of my attorney is my own act." In *Latuch v. Pasherante*, 1 *Salk.* 86, (Mich. 8 Wm. 3,) the Court of King's Bench held that the client was bound by the consent of his attorney, although given contrary to the client's orders, and that the Court could take no notice of the client. And in a recent case of *Mole v. Smith*, 1 *Jac. & Walk.* 673, Lord *Eldon* intimated that the consent of counsel must be given upon their own conception of the authenticity of their instructions, and that if given, the Court must act upon it, and that the client would be bound by such consent.

As to appeals, it was stated in *Toder v. Sansum*, 1 *Bro. P. C.* 468, to be a known and established rule, that an appeal does not lie against an order made by the consent of parties (b).

(a) 7 *Vin.* 398 (nom. *Norcot v. Norcot*), 8 *Vin.* 299. there was no instance of a rehearing being granted after a

(b) In *Rex v. Wightman*, 1 *Anstr.* 81, *Eyre*, C. B., said that *Blundell v. Macartney*, 2 *Ridg.*

The cases of *Taylor v. Bouchier*, 504, *Buck v. Fawcett*, 3 P. W. 242, were also cited; and it was further contended that the petition for a rehearing was informal, in not stating the grounds on which the order in question was impeached. *Giffard v. Hort*, 1 Scho. & L. 398.

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When the petitioner, *Anderton*, applied to the Court for liberty to prove the amount of the alleged balance, he brought himself within the jurisdiction of the Court, and the spirit of the act of parliament, which makes proof or claim an election. He is, therefore, bound to submit himself to the jurisdiction of the Court in bankruptcy, and cannot be permitted to seek here the benefit of a dividend, and, at the same time, to dispute at law the validity of the commission. It is clear that his design was to force from the assignees a disclosure of their case at law, in answer to his petition. But if the Court adheres to the principle of its former decisions, it will not hesitate to prevent Mr. *Anderton* from using at law the evidence which has been so obtained. *Ex parte Price*, *Buck*, 230; *ex parte Burgess*, *Jac. Rep.*, 559. He has not only obtained from the assignees affidavits, disclosing the merits of their case, but has also compelled them by his petition to delay a dividend under the commission. He has placed them in a situation from which he cannot now with-

P. C. 557; Downing v. Cage, 1 Eq. Ab. 165; 2 Harr. Pr. 84; *Allan-son v. Doulsen* (1703), *Colles*, P. C. 299; *Wyndham v. Wyndham*, 3 Rep. Ch. 22; 2 Freem. 127. In *Harrison v. Rumsey*, 2 Ves. 488, Lord Hardwicke, C. said, "he would by no means set aside a decree obtained by consent of counsel on both sides; for it would be most dangerous. It was an established rule not to do it, nor would he make the precedent." *S. V. Butterfield v. Butterfield*, 1 Ves. 133; *Buck v. Fawcett*, 3 P. W. 242.

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draw or relieve them, and by so doing he must be considered as having made his election. The late decision, in *ex parte Edwards*, ante page 116, does not apply, because the Lord Chancellor expressly founded his judgment upon the fact of there being distinct debts, arising upon separate and distinct contracts, which entitled the party to prove under the commission for the one, and to proceed at law for the other.

His Honour having stated the particulars of the petitions presented by *Anderton*, and by the assignees, proceeded as follows :

March 13. When I advert to the prayer of the petition presented by *Anderton* on the 29th of November 1828, and consider the nature of the relief which is asked, I think the Court would be compelled to notice incidentally the questions, whether the goods were properly deposited with *Anderton* by the bankrupts? and whether *Anderton* acted correctly in selling part of those goods, and receiving and applying to his own use the produce of such sales? It is on this latter part of the transaction that the assignees have commenced their action at law. But *Anderton's* petition extends to and solicits relief in respect of every part of the transaction; and it cannot be considered that his action and petition apply to distinct matters. He has submitted his whole case to the jurisdiction of the Court in bankruptcy; and the question, therefore, arises, whether he can be permitted to seek relief under the commission here, and to dispute its validity at law. Even admitting that the terms of the 6 Geo. 4. c. 16. s. 59. do not directly apply, and that there has been hitherto no decision on the point, I am still of my opinion, on general principles, that a party who has presented a petition to this Court,

seeking relief and benefit under a commission, in respect of a particular transaction, ought not to be permitted, as defendant to an action brought against him by the assignees, in respect of the same transaction, to dispute the validity of the commission under which he has so presented his petition for relief. Mr. *Anderton* must, therefore, be restrained from putting in issue the validity of the commission.

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Ordered accordingly.

Ex parte PAUL and another.—In the matter of Sir CHARLES RICH, Bart.

V. C.
LINC. INN,
March 7,
1829.

THIS petition of the assignees stated that the petitioners brought an action against the sheriff for the purpose of invalidating an execution ; that upon the trial it appeared that there was not a sufficient trading to support the commission ; that the petitioners had incurred various costs, charges, and expences in the prosecution, support, and defence of such commission, in commencing and trying the said action, and in the care and protection of the mansion and other property of the said Sir *Charles Rich*.

The assignees, after the trial of an action, commenced by them. where it appeared that there was not a sufficient trading to support the commission, and after other acts under the commission, presented a petition to have the commission superseded, and that all costs and expences incurred might be paid by the petitioning creditor: Held, that the application came too late, and that the petitioning creditor was not responsible.

The petition prayed that the commission might be superseded, and that the costs, charges, and expences of and relating to the prosecution, support, and defence of the commission, and of and relating to the conduct and trial of the action, and also in the care and

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protection of the mansion and property, and in the sale of a part of the property, with the costs of the supersedeas and the application, might be paid by the petitioning creditors; or that the petitioners might be discharged from being assignees, and that the petitioning creditors might pay the costs, charges, and expences which had been incurred by the petitioners in the prosecution and support of the commission, and of and relating to the action and trial, and in the care and protection of the mansion and property, and in the sale of part of the property, and the costs of the application, together with the costs of the removal of the petitioners.

Mr. *Sugden* and Mr. *Montagu* for the petition :—

The only question in this case is, whether the assignees or the petitioning creditor should pay the costs which the assignees have incurred in the discharge of their duties under a commission, which ought never to have issued as there was not a sufficient trading to support it. In *re Bryant*, 2 *Rose*, 18., the Lord Chancellor said, that the assignee was bound to consider the commission under which he derived his appointment as a valid commission, and act accordingly. In *ex parte Graves*, 1 *G. & J.* 86., it was held that the assignees ought not, unless they are satisfied that the commission is invalid, to excite doubts respecting its validity.

Mr. *Horne* and Mr. *Collinson contra* :—

The assignees were electors, and voted for themselves as assignees; they cannot, therefore, complain of the consequences in which they have involved themselves. In *ex parte Johnson*, 1 *G. & J.* 23., where the commission was virtually superseded, the petitioning creditor was

ordered to pay the messenger's costs to the choice of assignees, and the assignees to pay the subsequent costs. In addition to these reasons this application is made at too late a period.

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Mr. Sugden in reply : —

The general principle, that the petitioning creditor is bound to support the commission, is clear; has invariably been acted upon; and, until this moment, was never doubted. In *ex parte Graves* it was taken for granted, according to all previous practice, that the costs attending the commission, if invalid, must be paid by the petitioning creditor. In the communication there made by the assignees to the petitioning creditor, they say, we must apply "to the Lord Chancellor to supersede the commission at your cost, unless we can procure more satisfactory evidence of an act to support it;" and they add: "should the commission be ultimately superseded, you will be liable to all the costs incurred." The reasoning of the counsel in support of the petition in this case of *ex parte Graves*, with respect to the situation of assignees, is unanswerable: "If the assignees discover that the commission is invalid, are they to disclose the invalidity to purchasers, and reduce or destroy the estate, or conceal it to the injury of the purchasers or themselves? Are they to proceed at a great expence for a long period of time, ultimately to sustain irreparable loss, or at once to put an end to what ought never to have been issued? It is said that the assignees ought, before they accepted the trust, to have been well assured of the validity of the commission; but, before their election, they have no means of judging upon these facts. If, upon their election, objections are found, it is then and not till then their duty to have all doubt removed."

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Lord *Eldon*, in his judgment, says: "It is the duty of assignees, as soon as possible, to be assured that the ground upon which their first steps are taken, is secure. For this end, it is a fixed rule, that the petitioning creditor is bound to give every information in his power, upon every subject which comes within his knowledge as petitioning creditor; by the very act of issuing a commission, he stands pledged to establish its validity;" and, "if, after they are appointed, when they have the power of examining the proceedings, looking to the insufficient evidence put upon the proceedings, they feel doubtful of the petitioning creditor's debt, and the act of bankruptcy, are they not to call upon the petitioning creditor to produce his proof, and is not the petitioning creditor bound to give explanation upon explanation, until the whole difficulty be cleared up? There is no doubt but the assignees have a right to call upon him for such explanation, and the petitioning creditor must, to the extent of his power, satisfy their minds. In demanding this explanation, they are aiding the commission — aiding the trust. With a view to sale of the bankrupt's property, and actions at law, this is absolutely necessary: they must prove the petitioning creditor's debt and act of bankruptcy, which it would be impossible to do under such circumstances as these." In *ex parte Graves*, the Lord Chancellor having been satisfied, after an enquiry, that there was not a good act of bankruptcy, ordered the commission to be superseded, and all costs to be paid by the petitioning creditor. (a)

(a) The Lord Chancellor's order was as follows: "I do order that the costs of the said petitioners, sustained by them under the said commission, and the costs attending upon the choice of assignees thereunder, as also their costs of and occasioned by their said several former petitions, presented to me in this matter, of the said enquiry before the commissioners, and of this appli-

A similar application, in *ex parte Miller*, (Aug. 1820) was considered a matter of course. It was a petition by the assignees to supersede, and that the petitioning creditor should pay all costs and expences, on the ground that the commission was concerted, and that there was not a good petitioning creditor's debt. Upon a reference to the master, he reported that there was not a sufficient debt; but his report was over-ruled. Upon a second petition by the assignees, stating that, from facts since discovered, the fraud in issuing the commission was established, the commission was ordered to be superseded, and all costs and expences, which had been incurred, to be paid by the petitioning creditor. (*b*)

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cation to me, be paid to them by the said *Frederick White*, the petitioning creditor under the said commission, such costs to be taxed by Mr. *Clerk*, one of the Masters of the Court of Chancery, if the parties differ about the same." 8th June 1818.

(*b*) The Lord Chancellor's order, in *ex parte Miller*, was as follows: "I do order that the said commission, issued against the said bankrupts on the petition of the said *Thomas Bennett*, and bearing date the 25th day of March 1815, be superseded, and that a writ of *supersedeas* do forthwith issue for that purpose; and that the said petitioner *James Bate* be at liberty to issue a new commission against the said bankrupts, upon his own petition, such new commission to be directed

to the same commissioners. And I do order that the said *Thomas Bennett* do refund to the assignee or assignees, to be chosen under such new commission, the said sum of £14. 1s. 11d. in the said recited petition mentioned to have been paid to him, as the amount of his taxed costs up to the time the assignees were chosen under the said commission, so taken out by him as aforesaid. And I further order that the said *Thos. Bennett* do pay to the petitioners all such costs as have been incurred and paid by them in the prosecution of the said last mentioned commission, from and after the choice of the assignees under the same, (save and except so much of such costs as have been already paid by the said *Thomas Bennett*, pursuant to my order made in this matter on the 10th day of

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With respect to *ex parte Johnson*, it was a mere question as to the liability of the assignees to the messenger, which, whatever might be the ultimate right between the assignees and petitioning creditor, could not be doubted. It is clear that in *ex parte Johnson* the messenger was entitled to the prayer of his petition, which was, that the petitioning creditor might pay the costs to the choice of assignees, and the assignees the subsequent costs.

As to the assignees having voted for themselves, they voted upon the supposition, which the petitioning creditor had created, that the commission was valid. They have exercised a right consequential upon the proof of their debts, which is no admission of the validity of the commission. This is stated by Lord *Ellenborough* in *Rankin v. Horner*, 16 *East*, 191, who says: "When a commission issues, the creditor who sues it out is to be prepared at his peril with evidence to support it: the commissioners are not to declare the party a bankrupt, unless there be satisfactory proof that he is so; and when they have so declared him, creditors are to come in, under the peril of being barred by a certificate, to prove their debts. The creditors have not the means of knowing what was the evidence upon which the party was declared a bankrupt;

Nov. 1818, on a former petition of the said petitioners presented to me,) together also with the costs of and occasioned by another petition of the said petitioners presented to me in the same matter on the 2d day of August 1819, and of my order made thereon, and of and incidental to the inquiries thereby directed to be had and made before the commissioners, and of their report thereon; and also the costs of and occasioned by this present application to me; such several and respective costs to be taxed by Mr. *Harvey*, one of the Masters of the Court of Chancery, if the parties differ about the same." August 8th, 1820.

they had no right to be present when that evidence was given; they have no right to look at the proceedings under the commission, in order to see what that evidence was: and is it reasonable that they should be put to the dilemma, of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed, when they had not the means of judging whether such acts existed or not, and of having such their supposed admission received as evidence against them, in every case in which the question could arise? The certificate, when obtained, is conclusive evidence of every fact necessary to support the commission; so that they would be conclusively barred of their debt, in case of a certificate, if they did not prove it under the commission: and it should seem to require some strong authority to establish, that by proving they had admitted facts respecting the existence of which they had no means of enquiring. By proving a debt, the party at most only gives credit to the petitioning creditor, and to the commissioners, that the former has not sued out the commission, nor the latter declared the party bankrupt, without proper grounds. The petitioning creditor and the commissioners hold out to the world that there are such grounds; and the party who proves his debt cannot, in reason, be considered as admitting more, than that he knows nothing at the time to the contrary." If assignees be compelled to pay costs, without a knowledge of the requisites to support the commission, it will insure to the parties who illegally issue a commission, the direction and controul of it.

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The VICE-CHANCELLOR:—

Under the circumstances stated; I think that the assignees must be held liable for the costs which have

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been incurred. It would be neither prudent, nor consistent with principle, to make the petitioning creditor responsible in a case, where the assignees have not only disposed of part of the property, but have delayed their application until after the trial of an action at law, commenced by them, in which they failed to establish a sufficient trading. In *ex parte Graves*, the petition was presented by the assignees immediately after their election, before any important proceedings had been undertaken, or responsibility incurred. Lord *Eldon* said, "that it was the first duty of assignees to satisfy themselves that the commission was well founded." (a) Besides, in that case, one defect was, the want of a petitioning creditor's debt; a defect which must have been known to him, and for which he was justly responsible. In *ex parte Miller* the commission was discovered to have been concerted, and was a fraud practised by the petitioning creditor upon the Court.

Petition dismissed with costs.

(a) 1 G. & J. 92.

Ex parte CUNNINGHAM.—In the matter of
CAVENAGH.

V. C.
LINC. INN,
March 30,
1829.

ON this petition being called for hearing, Mr. *Montagu* applied to have it referred to the master, on the ground that it contained irrelevant and impertinent matter.

A formal objection successfully urged on one occasion, is not a waiver of the respondent's right to refer for impertinence, when the same petition is again called for hearing.

Mr. *Knight contra* :—

The right to refer has been waived, because, when the petition stood in the paper, on a former day, a formal and technical objection, *dehors* the petition, was taken by the respondent, and no notice was given of the present objection.

The VICE-CHANCELLOR :—

I think the right to refer for impertinence has not been waived, by the circumstance of the counsel for the respondent having, on a former occasion, taken and succeeded in a formal objection to the petition.

Reference to the master ordered.



V. C. *Ex parte* NEAL.—In the matter of BADNALL.

LINC. INN,

April 13,
1829.

A person engaged as a traveller, at an annual salary; Held, to be a servant or clerk within the meaning of the 6 Geo. 4. c. 16. s. 48.

THIS was a petition, for an order that the assignees should pay 111*l*., which the commissioners had awarded to the petitioner, under the 6th Geo. 4. c. 16. s. 48., they having been of opinion that a traveller was a clerk or servant within the meaning of the clause.

Mr. *Rose* for the petitioner.

Mr. *Montagu*, for the assignees, submitted that the intention of the legislature was merely to give a preference to *domestic* servants, or to clerks, strictly so called, who were but another species of domestic servants, employed in recording events which occurred in the trade; and that it never could be supposed that the legislature intended to give this preference to every person, who, in any capacity, was employed in the service of a trader: that it was a subject of considerable importance, and especially, as in a late case, it had been contended that four or five hundred people, who were employed in a manufactory, were entitled to this preference. *Ex parte Grellier, ante*, page 95.

It was clear that the clause had been adopted from the bankrupt laws of Scotland, which did not, however, sanction the extensive construction now attempted to be established. (a)

The VICE-CHANCELLOR:—

The words of the 48th section are as follows: “That when any bankrupt shall have been indebted, at the time

(a) *Ex parte Grellier, ante* page 101, (note a).

of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last-mentioned amount." From these words it appears, that the legislature contemplated, not servants hired from day to day, but servants engaged upon a salary, to whom more than half a year's wages might be due; and as in the present case the traveller was engaged upon an annual salary, I am of opinion that he falls within the meaning of the clause. The order must, therefore, be made.

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In the matter
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BADNALL.

Ordered accordingly.

Ex parte WRAY.—In the matter of HORDEN,
WOOD, and CROSSE.

V. C.
LINC. INN,
April 13,
1829.

THE petition stated, that a commission of bankrupt had issued against *Horden, Wood, and Crosse*; that since the commission had issued, it had been discovered that *Wood* was an uncertificated bankrupt; and the petition, therefore, prayed for a supersedeas, and that a new commission might issue against *Horden and Crosse*, or that the commission might be superseded as to *Wood*, without affecting its validity as to *Horden and Crosse*.

A commission having issued against A., B., and C., and it being subsequently discovered that B. was an uncertificated bankrupt, the commission was ordered to be wholly super-

seded. *Quære*, Whether a joint commission, invalid in its concoction as to one partner, can, after a supersedeas as to that one partner, be rendered valid against the remaining partners.

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HORDEN
and others.

Mr. *Montagu*, for the petition, stated, that it appeared to him most advisable for his clients to accept the first part of the prayer, that the present commission should be wholly superseded, notwithstanding the decisions in this Court in *ex parte Bygrave*, 2 G. & J. 391, and in *re Coleman*, ante, 15; because it had never yet been decided, at law, that a joint commission, which was invalid in its concoction, could be rendered valid as to the remaining partners, after a supersedeas as to the partner against whom it was invalid; and as it was not clear that such a case was originally or expressly contemplated by the legislature, it might, perhaps, be doubted, whether it was included in the general words of the 6th Geo. 4. c. 16. s. 16., by which it was enacted, "that any creditor or creditors whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm; and every commission issued upon such petition shall be valid, although it does not include all the partners of the firm; and, in every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons; and the validity of such commission shall not be thereby affected as to any person as to whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected." These words would appear to imply, not that an invalid commission can be made valid by a partial supersedeas, but only that a commission, originally valid, shall not be rendered invalid, by directing that to be done, which justice to one of the partners may require.

The VICE-CHANCELLOR accordingly ordered that the commission should be wholly superseded.

Ex parte CANDY and another.—In the matter of
BROCK.

V. C.
LINC. INN,
April 13,
1829.

AT the second meeting under this commission, *Candy*, whose debt amounted to 2,641*l.*, and *James*, whose debt amounted to 87*l.*, elected *James* sole assignee. Other creditors, whose debts amounted to 668*l.*, nominated *James* and *Atkinson* assignees. *James* refused to act with *Atkinson*. The solicitor to the petitioning creditor objected that *James* was an unfit person to be assignee, because he was nominated by *Candy*, who had an interest adverse to the estate. The commissioners, being of opinion that this objection was valid, rejected the choice of *James* as sole assignee; and having erased the name of *James* from the list which contained the names of *James* and *Atkinson*, declared *Atkinson* duly elected assignee.

The rejection by commissioners of an assignee as unfit, under 6 G. 4. c. 16. s. 61. is not final: An appeal lies to the Lord Chancellor.

This was a petition by *Candy* and *James*, praying that *Atkinson* might be discharged from being assignee; that *James* might be declared sole assignee; and a new assignment executed to him.

Mr. *Sugden* and Mr. *Montagu* for the petition :—

By the old law, creditors had the absolute power to elect the assignees, and the Court could not interfere with their choice until they abused the trust reposed in them by the legislature. To obviate the delay and expence attendant upon an application to the Lord Chancellor, to vacate a choice of assignees, on account of an improper election, the legislature has given to the commissioners a power to reject an unfit person. The words of the 6 Geo. 4. c. 16. s. 61. are: "The choice shall be made

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Ex parte
CANDY
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of
Brock.

Adverse interest
by an elector is
not a reason for
rejection of the
elected.
Adverse interest
in the elected
when it
amounts to
unfitness.

by the major part in value of the creditors so entitled to vote : provided that the commissioners shall have power to reject any person so chosen who shall appear to them to be unfit to be such assignee as aforesaid, and, upon such rejection, a new choice of another assignee or assignees shall be made as aforesaid." The only question, therefore, is, whether or not *James* was an unfit person to be assignee? The reason assigned, in proof of his unfitness, is, that he was elected by *Candy*, who has an adverse interest ; but there was, in fact, no adverse interest, and even if there were, it is not an objection in law. If *James* himself had an interest adverse to the estate, his fitness or unfitness to be assignee would depend upon circumstances. If the interest were very large, and the debt very small, he might be unfit, but not so if the debt were great, and the interest small ; and even if the interest were great, but the residue of the debt considerable, it would not follow that he ought not to be assignee. In *ex parte De Tastet*, 1 *Ves. & B.* 280., *De Tastet* had an adverse interest to the amount of 60,000*l.*, but the whole of his debt was upwards of 120,000*l.*, and in this case, Lord *Eldon* would not remove him from being an assignee, but appointed another person to act as assignee in the investigation of this adverse interest. Lord *Eldon* says : " As to *De Tastet*, I feel very much the circumstance that he must now be a creditor for 86,000*l.* and may be so for a great deal more ; and if I could be quite sure that I foresaw sufficiently, to provide by any modification of the general rule so as to secure the interest of all the creditors, I should be glad to take such a course. It strikes me that this may be attained by appointing one of these petitioners a co-assignee ; the person so appointed to be the only one to act in the investigation of *De Tastet's* demand ; and if no more objection can be stated, I will make that order, directing that such

person shall be considered as the sole assignee in the investigation of this demand, and shall be at liberty to bring such actions and suits as may be advisable ; taking care that the title of *De Tastet*, as assignee, shall not be set up against them." The same course of proceeding has been adopted in other cases. In the bankruptcy of *Ogilvie*, cited in *ex parte De Tastet*, the assignees were not removed, but another assignee was appointed to act between them and the general body of creditors, and the same course was frequently adopted by the late Vice-Chancellor, Sir *John Leach*. In the present case, it is not pretended by any class of creditors, that *James* is an unfit person to be assignee. All the creditors concurred in voting for him; and no reason for his unfitness has been alleged. With respect to his having been elected by *Candy*, who has an adverse interest, the commissioners cannot reject an assignee because an elector is unfit to be an assignee. The question, therefore, remains as before — was *James* fit or unfit ?

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But, even if this imagined adverse interest were a sufficient reason to warrant the commissioners in rejecting *James* as unfit, they have not acted regularly in the rejection. Instead of proceeding to a new election, they struck out the name of *James* from the second list, and declared that *Atkinson* was the assignee ; forgetting that if the election of one of two assignees is bad, it is bad as to both, for the creditors may confide in both, although they would be unwilling to place confidence in either separately. In *ex parte Shaw*, 1 G. & J., 155, Lord *Eldon* says : " Now, speaking the language of experience, and looking to the opinions of others whom I am bound to respect, I have no doubt that if *Carroll* be not well chosen, neither *Duff* nor *Wilkie* is well chosen ; if the

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creditors vote for three persons to manage the affairs of the bankrupts, they thereby express their opinion that the affairs of the bankrupts should be committed to the three; and I cannot collect that they should be committed to two of the three, if one of them be rejected. I may suppose that it might be said by a creditor, 'I will vote for all the three, but if you take *Carroll's* experience away from them, I will not vote for the other two without him.' "

Mr. Horne and Mr. Knight contra :—

There are two questions for consideration :—

First, Whether the power granted to the commissioners by the 6 Geo. 4. c. 16. s. 61. can be made the subject of appeal to this Court?

Secondly, Whether the directions of the act were substantially followed by the commissioners in this case?

Previously to the late act, the commissioners were, in the election of assignees, entrusted with powers differing but little from those of returning officers. This state of the law being found in many respects objectionable, it was at first pressed upon the attention of the legislature, that the creditors ought to be deprived of the right of interfering in the election of assignees; but, subsequently, a middle course was thought preferable, and it was settled that the creditors should elect, subject to the revisal and approbation of the commissioners.

The words of the act are : " Provided that the commissioners shall have power to reject any person so chosen who *shall appear to them* unfit to be such assignee

as aforesaid; and, upon such rejection, a new choice of another assignee or assignees shall be made as aforesaid." (a)

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The terms, it is to be observed, are not that the commissioners shall have power to reject those who are unfit, but those who *appear to them* unfit. In determining the meaning of this clause, it must be remembered that, from their power of examining *vidé voce*, much information may come to the knowledge of the commissioners, at the opening of the commission, and at subsequent meetings, relative to the character, conduct, and disposition of the parties who are afterwards proposed as assignees, which it would be scarcely possible to communicate by affidavit. They may have become acquainted with the nature of their dealings and connexion with the bankrupt, their experience or want of experience in trade, and their general qualifications to discharge, with advantage, the trust of collecting, realizing, and distributing impartially the bankrupt's estate. For these reasons, the legislature gave them the power of rejecting those who appear to them unfit; and as this Court has neither the same opportunities of obtaining information, nor even the means of ascertaining on what grounds the commissioners acted, it would seem that an appeal from their decision could hardly have been contemplated. Under ordinary circumstances, it cannot but prove extremely dangerous that this Court should be required to decide upon the qualifications of an assignee.

As to the second point, it is clear there was a rejection, and equally clear that there was then, sub-

(a) 6 Geo. 4. c. 16. s. 61.

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stantially, a fresh choice; because the record, shewing that *Atkinson* was elected, is sanctioned by the judicial signature of the commissioners, and the Court will therefore infer that the choice was regularly made.

Mr. *Sugden* in reply :—

The great seal has always exercised the jurisdiction of reviewing the decisions of commissioners of bankrupt. It is a paramount jurisdiction, and can only be taken away by express words. The act of parliament gives the commissioners the power to adjudicate, and it might be as reasonably contended that the Court has no jurisdiction to review their decisions on this head. The duty of the Court, in deciding upon the fitness or unfitness of an assignee, cannot be more difficult than any other duty it has to discharge, on appeal, if its judgment is to be formed on facts, and not on suspicions.

The VICE-CHANCELLOR : —

April 4. I desired this matter to stand over yesterday, on account of a doubt in my mind, whether, in point of fact, there had been an election, by *Candy* and *James*, of *James* to be the sole assignee. But, on looking at the affidavit of *Candy*, it appears to me to be stated, with sufficient distinctness, that there actually was a nomination of *James*, in the first instance. I conclude, therefore, from this affidavit, and from what was admitted at the bar, that there was actually an election, by *Candy* and *James*, of *James*, and that the commissioners, upon the representation made to them, thought proper to reject *James*. Upon the question, whether the Court has jurisdiction to interfere, I entertain no doubt whatever; because I apprehend that it is inherent in the

jurisdiction of the great seal to superintend the acts of every person connected with the commission, except where the legislature has otherwise directed. The jurisdiction to remove assignees, prior to the late act, was always exercised without there being any express authority given by statute, because it was considered to be inherent in the jurisdiction of the great seal.

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Then the remaining question is, whether the commissioners properly rejected *James* as sole assignee; and, upon reading these affidavits, my opinion is, that he ought not to have been rejected. There might appear to be some degree of adverse interest between *Candy* and Co. and the bankrupt's estate; and as *James* himself had no particular interest, and merely submitted to be nominated assignee because *Candy* and Co. wished him to be so, these circumstances, operating on the minds of fair and honourable men, might induce them to conclude that there was sufficient ground to reject *James* as sole assignee; but, exercising my judicial opinion, it seems to me that this was not a sufficient ground. I think that by the law of the land the right of nomination was in *Candy*; and there is no sufficient ground stated on the affidavits to warrant the rejection of the person nominated by him.

My opinion therefore is, that the assignment to *Atkinson* must be vacated, and that another assignment must be made to *James*.

Against this decision the present appeal was presented.

Mr. *Horne* and Mr. *Knight* for the appellant:—

There are certain cases in the administration of the bankrupt laws, in which, from the power possessed by

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the commissioners to examine *vivâ voce*, and to observe the conduct and demeanour of the parties, and what can never be accurately communicated by affidavits to the Lord Chancellor, the legislature has entrusted the commissioners with absolute jurisdiction, uncontrollable by the Lord Chancellor. The argument founded upon the general superintending jurisdiction of the great seal is stated too broadly: the commissioners exercise many powers in which there is no appeal from their decisions.

If the commissioners refuse to declare the bankruptcy, the Lord Chancellor cannot order them to declare it against their opinion of the insufficiency of the evidence. *Ex parte Perrin; Buck*, 510.

By section 45 of the new act, the commissioners are empowered to nominate a provisional assignee as often as they they shall think fit. (a).

Again, the commissioners have, as to the certificate, an independent character, and they cannot be compelled, either by the Lord Chancellor, or by *mandamus*, to sign it. In *ex parte King*, 11 *Ves.* 424 (b), Lord *Eldon* says, in words extremely applicable to the present case: "Next the commissioners are to sign, who have the right given to them to exercise judicial discretion, duly and fairly applied to the circumstances; whom, it appears

(a) "It shall be lawful for the commissioners, as often as they shall think fit, by writing under their hands to appoint one or more person or persons an assignee or assignees of the bankrupt's real and personal estate, or of any part thereof, which assignee

or assignees shall or may be removed at the meeting of the creditors for the choice of assignees, if they shall think fit." 6 *Geo.* 4. c. 16. s. 45.

(b) See also *ex parte King*, 7 *East*, 92.

by the act, the legislature recollected as having been present at all the transactions during the bankruptcy; better judges, therefore, of the conformity than the Lord Chancellor or the two Judges can be." And in page 425, "Have I a right to issue a mandatory order to them, to say that it is [a full disclosure]? No such authority is given to me."

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By the 60th section, new powers were given to the commissioners, to inquire into and expunge the proof of debts; and, to negative what would be the natural inference, that they were to judge without appeal, there is a right of appeal expressly given to the parties. The words are: "Whenever it shall appear to the assignees, or to two or more creditors who have each proved debts to the amount of 20*l.* or upwards, that any debt proved under the commission is not justly due either in whole or in part, such assignees or creditors may make representation thereof to the commissioners; and it shall be lawful for the said commissioners to summon, provided that such assignees or creditors may apply in the first instance by petition to the Lord Chancellor, or that either party may petition against the determination of the commissioners." But in the 61st section, upon which the present question arises, such right of appeal is not given. The legislature, therefore, has considered that the discretion to be exercised ought to be left to the commissioners; and it may be compared to the appointment of a receiver, where the master's decision, as far as relates to the comparative merits of the candidates presented for his selection, is conclusive.

Mr. *Sugden* and Mr. *Montagu* for the respondent:—

The general superintending power of the Lord Chancellor, although not given in express words by any

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statute, has never been doubted. In the case of *ex parte Stevens*, 14 Ves. 450 (a), Lord Eldon said, it was impossible to execute the statutes without implying such a power. The same doctrine is fully stated in the cases of *ex parte Rowton*, 1 Rose, 19; *ex parte Bradley*, 1 Rose, 202; and *ex parte Shaw*, 1 G. & J., 134.

The LORD CHANCELLOR:—

The question appears to be, whether there is any thing in the 61st section to exclude the general superintending jurisdiction of the great seal.

For the respondents:—

Such certainly is the only point; but there are no such words in the 61st section, and it is only by reference to the 60th section, that there is even the appearance of an intention to limit the jurisdiction. This, however, is only in appearance. The legislature having given a power of appeal to the commissioners to expunge debts, it might have been supposed that this was a repeal of the power possessed by the Lord Chancellor, and that it was not intended to permit two appeals; that "*expressio unius personæ est exclusio alterius*." To obviate this supposition, therefore, it was provided, that either party may petition against the determination of the commissioners; but if it is from this to be inferred, that there is not to be a first appeal from the commissioners to the Lord Chancellor, in the rejection of assignees, it will be a virtual repeal of the Lord Chancellor's jurisdiction in all cases where the right of appeal is not expressed by the statute. The evil which would result from the commissioners exercising an uncontrolled discretion cannot be doubted.

(a) The case reported in 14 Ves. 450, under the title "Anon-
ymous," was the case of *ex parte Stevens*. See 1 Rose, 203., note (a).

The LORD CHANCELLOR :—

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In this case, the only point which appears to be of material consequence is as to the right of appeal ; and I am certainly not satisfied that there are any words in the 61st section, to deprive this Court of the general superintending jurisdiction which it exercises in bankruptcy. The argument, drawn from the 60th section, appeared to me, at first, to be of some weight, but I think it has been satisfactorily answered. Considering, therefore, that the Court has authority to interfere in a case of this nature, and that there were not sufficient grounds for the rejection of Mr. *James* by the commissioners, I am bound to confirm the decision of the Vice-Chancellor.

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Petition of appeal dismissed with costs.

Ex parte HINTON.—In the matter of BURGE.

V. C.
LINC. INN,
April 14,
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AN order had been made on a former petition, that the costs of the petition should be paid out of the bankrupt's estate : this was a petition to compel the payment of such costs. It stated at considerable length the original petition, and various additional allegations, and was supported by three affidavits in the same words.

A petition for the payment of costs, previously ordered, which stated additional allegations : Held to be irrelevant.

Mr. *Sugden* and Mr. *Rose* for the petition.

Mr. *Horne*, Mr. *Montagu*, and Mr. *Knight*, for the respondents, contended, upon the authority of *ex parte Vernon*, 13 Ves. 270, and *ex parte Ross*, 17 Ves. 376,

1829. that the petition ought to be dismissed with costs, without prejudice to the petitioner's presenting the usual short petition, for the costs to which he might be entitled.

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The VICE CHANCELLOR : —

As it appears to me that the assignees had not any assets in hand, the petition fails on the merits; but even if the merits had been in favour of the petitioner, I most certainly should have dismissed this irrelevant petition with costs, and have left the petitioner to present the ordinary petition.

Petition dismissed with costs.

V. C.
May 11,
1829.

Ex parte DAY.—In the matter of EVERIST and SMITH.

Where the bankrupts were described as "late of the Kent Road, coal merchants," and it appeared that they had quitted that trade in 1826, and had since been separately engaged in farming: Held, that the description was insufficient, and that the commission should be superseded.

THIS was a petition to supersede, on the ground that the bankrupts were not sufficiently described in the commission.

In 1821, the bankrupts carried on business, in partnership, as coal merchants, upon a wharf called the Surrey Canal Wharf; but early in the year 1826, *Joseph Everist* withdrew from the concern, and at the end of the same year, *Richard Smith* also relinquished the business. It appeared, that the bankrupts had, subsequently, engaged in farming, upon distinct farms, and each on his separate account.

In the commission which issued on the 23d of Jan. 1829, the bankrupts were described as "late of the Kent Road, in the county of Surrey, coal merchants, dealers, and chapmen."

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Mr. *Sugden*, for the petition, submitted that this short description, although not false, was insufficient, inasmuch as there was nothing to inform separate creditors, that the bankrupts were the individuals who had been occupied in farming, and known to them as farmers. The residence of each of the bankrupts, since they relinquished business as coal merchants, ought to have been added. There is a joint, but no separate description. *In re Gordon*, Mont. & G. B. L. 66; *ex parte Marston*, *ib.*; *Edens*, B. L. 57; *ex parte Beckwith*, 1 G. & J. 20; *ex parte Horsley*, 2 Mad. 11.

Mr. *Horne*, *contra*, contended that the description was sufficient, as it did not appear that the bankrupts had been engaged in trade since the dissolution of their partnership as coal merchants, and submitted that none of the cases cited amounted to an authority for what was now asked.

The VICE CHANCELLOR: —

As the bankrupts relinquished their copartnership trade so far back as the year 1826, the separate description of each, since that time, should have been added; and without it, I think the description in the commission must be considered insufficient.

Supersedeas ordered.

May 18, 1829. *Ex parte* MAN.—In the matter of HARVEY and another.

A. proved a debt of 424*l.* against the separate estate of B., and died before B. had obtained his certificate, having bequeathed to B. a legacy of 200*l.*: Ordered, on the petition of the assignee, that the sum of 200*l.* should be deducted from the proof of 424*l.* made by A.

THE petition stated, that on or about the 24th of December 1825, a commission of bankrupt issued against *R. C. Harvey* and *E. Hill*, and that the petitioners were appointed assignees; that *Harvey* was indebted upon bond to *S. Blyth* in the sum of 424*l.*, and that *Blyth* proved the debt of 424*l.* against the separate estate of *Harvey*, but that before *Harvey* obtained his certificate *Blyth* died, having by his will, dated the 3d of October 1818, bequeathed to *Harvey* a legacy of 200*l.*; that *J. Plane*, who was sole executor of *Blyth*'s will, afterwards received a dividend under the commission of 5*s.* in the pound on the said sum of 424*l.*, and that *Plane* afterwards refused either to pay to the petitioners the legacy and interest, or to refund the whole or any part of the dividend received. The petition, therefore, prayed that *Plane* might be ordered to pay the petitioner, the assignee, the legacy of 200*l.*, or, if the petitioner was not entitled to the legacy, that the proof of *Blyth* might be expunged or reduced.

Mr. *Rose* and Mr. *Turner* for the petition.

Mr. *Bickersteth* *contra*.

The VICE CHANCELLOR :—

Let the proof be reduced to 224*l.*, and direct that *Plane* shall refund the excess of dividend.

It was agreed between the parties that no objection should be made to the jurisdiction.

See 2 Keen 319
contra.

Ex parte PALMER.—In the matter of BENTLEY.

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HALL,
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MR. *Rose* applied, at the instance of the petitioning creditor, to have a commission superseded which had been sealed, but not opened, and submitted that this might be safely done, without serving the bankrupt, or shewing that he could not be found, if a reservation was made in the order of all the rights of the bankrupt, whether by action or petition.

Commission sealed, but not opened, ordered to be superseded, at the instance of the petitioning creditor, reserving to the bankrupt, in the order, all his rights, whether by action or petition. (a)

The LORD CHANCELLOR said he had reconsidered the rule stated in *ex parte Forth*, (*ante* page 10,) and that he thought it would be proper to vary it, because great injury might result to creditors from delaying a commission which ought immediately to issue; and the bankrupt could not be injured, provided there was a reservation in the order of all his rights.

The order for a *supersedeas* was accordingly made.

(a) See *ex parte Forth*, *ante* page 10.

L. C.
WESTM.
May 25,
1829.

A bankrupt, under examination, being asked, whether the statements contained in a written paper, produced and shewn to him, were true statements? demurred to the question, on the ground that his answer might expose him to a criminal prosecution, and was committed for not answering: Held, under the circumstances of the case, that the bankrupt was entitled to demur to a question in so general a form. Commissioners of bankrupt are not empowered to dispense with the rule of law, by which a party is protected from criminating himself.

Ex parte KIRBY.—In the matter of KIRBY and THOMAS.

THIS was an application by *John Kirby*, one of the bankrupts, to be discharged, upon a writ of *habeas corpus*, from a commitment by the commissioners for refusing to answer.

The examination was as follows:—

“ Q. Do you know *Benjamin Corbett* of Pancras Lane, an accountant?

A. I do; he was employed by us to make out our accounts.

Q. Did you at any time make a statement to *Corbett* of your transactions with *Sewell* and *Cross*, which *Corbett* reduced into writing in your presence, and in the presence of your partner *Thomas*?

A. Yes, I did.

Q. Is the paper now produced, marked B., and bearing the mark of an exhibit before us of the 14th May, the paper referred to?

A. I believe that to be the statement.

Q. You are requested, for your better information, to read the paper marked B. now produced, and state if those two sheets of paper, purporting to be a copy of such statement, is a copy thereof?

A. It is a copy of the exhibit B. before mentioned.

Q. Are the statements therein mentioned true statements?”

The bankrupt, by the advice of his solicitor, demurred to this question, submitting that he was not bound to answer it, on the ground that the paper in question ad-

mitted that the bankrupts were insolvent at the time referred to, and that when so insolvent, they made purchases of goods for the express purpose of satisfying the debt of a particular creditor, and in pursuance of a concerted arrangement with that creditor, which might expose them to a criminal prosecution. The commissioners overruled the objection, and the question was then repeated:

“ Q. Are the statements contained therein true statements ?

A. I decline to answer the question.”

The bankrupt was thereupon committed for refusing to answer.

The following is a copy of the paper writing referred to :

“ Exhibit B.

“ K. was insolvent when T. joined him, and C. knew it; he was insolvent about 300*l.* or 400*l.* C. had the stock-book so shewing the affair; he stated to the citizens that K. and T. had a capital of about 1,300*l.* or 1,400*l.* between them, though he well knew that K. was insolvent as above, and T. had only 470*l.* We took stock in August; at that time our stock and book debts, and other effects, were about 1,500*l.* or 1,600*l.*, and we owed at least 1,900*l.* S. and C. were both informed of this, and C., who was in bed at the time, said: ‘ Well, its not so much short neither, but I know nothing.’ At this time we must have owed them about 1,500*l.* or 1,600*l.* for cash and goods; it was generally about twice the amount, but had been largely reduced by the sale of *Dudley’s* stock, by which sale we lost 550*l.* When *Phillips’* bad debt occurred, K. told C., who said: ‘ I have every confidence in your making

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it all right.' On the following morning, he came to Knightsbridge; K. accompanied him home, and saw him with Mr. *Sewell*. Mr. *Cross* said: '*Sewell*, these fellows must not fail for twelve months, for we must supply them with all the cash they want to keep up their credit; and at the same time they advised us to go to *Knatchbull* and Co., and buy three or four boxes of *Ogelby's* cloth; and we did accordingly go to *Knatchbull* and Co., and made a parcel. They likewise recommended us to go to other houses to buy silk damask, carpeting, plaids, and shawls, and that they would take them instead of cash for their debt; and we did buy such goods, and sell them to *S.* and *C.* at a sacrifice. We sold goods to *Dudley* and Co., and to *Evans*, at a loss, at 12½ per cent. for the first parcel, and 15 per cent. on all the others, in order to get their bills to cover *S.* and *C.* About November 1827, we began to borrow money of *S.* and *C.*, and pay them large and extra interest for it. On the 9th of November, we borrowed 490*l.*, and accepted a bill for 500*l.* due 10th January: the 10*l.* was for the interest thereon. After this time, all money borrowed of *S.* and *C.*, which was generally from the 4th to the 10th, they used to charge us 2½ per cent. for, if the same was not returned on or before the 12th: this we could rarely do, and have therefore, upon many occasions, paid the 2½ per cent. When we began, the stock was taken of *S.* and *C.* at prime cost, remnants and all—about 2,600*l.* This must have been at least 25 per cent. too dear. After *C.* knew of *Phillips's* bad debt, and our great deficiency, he wanted us to destroy the cash-book, which we would not do; his reason for that was, that the loans from him at so late a period might not appear. We borrowed cash of *S.* and *C.* after the 4th of September—upwards

of 1,000*l.*, that we might not fail till he was nearly out. *K.* and *Cross* had a private meeting before the latter went out of town, and it was then arranged when *K.* should call on the creditors for assistance, and that they should stop on the 4th of October; he stated he would rather be from home, and for *K.* to say he had applied to *S.* and *C.*, but *C.* being out of town, he could not obtain assistance. *C.* expected the creditors would have given time, during which he recommended us to take care of ourselves; and when on his return he found they would not give time, he said: "Have you made any thing?"—meaning, have you secreted any property?—"and if you have not, lose no time in doing it." The last goods purchased of *S.* and *C.* were, by agreement, charged such prices as would leave them no loss on the balance of their account, in case we paid 10*s.* in the pound. We destroyed I O U's at the request of *C.*, likewise all letters and memorandums relating to their account. *Mr. C.* has since said, you know nothing respecting the little interest, meaning the usurious interest; it can be stated by such things as had been previously settled, such as insurance on French goods, rent on our houses, &c.; in order that it might not appear there was more than proper interest charged."

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Mr. Collinson for the prisoner:—

The question for decision is, whether a bankrupt, in a case involving no disclosure of property, and of little importance to the creditors, is obliged to admit what may criminate himself.

The LORD CHANCELLOR, on looking at the return, inquired whether the bankrupt might not, without com-

1829. promising himself, have admitted some parts of the written statement; and whether he ought not, therefore, to have made a selection of the parts which he objected to answer.

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Mr. Collinson :—

It was not, I submit, any part of the bankrupt's duty to make a selection. The commissioners should have been careful to put lawful questions, for such only do the statutes require him to answer. A bankrupt cannot alter the questions; he must answer them in the form in which they are presented to him, or not at all. The document annexed to the examination, to the truth of which the bankrupt was interrogated, represents him as an insolvent man, who, at the instance of Messrs. *S. and C.*, to whom he was largely indebted, purchased goods on credit of Messrs. *Knatchbull and Co.*, in order to resell them to *S. and C.* at an under-value, in reduction of what he owed them. This is the disclosure of a fraud on *Knatchbull and Co.*, effected by a conspiracy, for which all parties may be indicted, and punished by fine and imprisonment.

The LORD CHANCELLOR :—

The bankrupt *Kirby* has already made a confession to a person whose evidence would be sufficient in a court of law.

Mr. Collinson :—

Admitting such to be the fact, the witness may die, when his testimony would perish with him; or the confession may have been obtained by threats or promises, which would render the evidence inadmissible. Besides,

the commissioners are now seeking for additional testimony, to which no previous confession of the bankrupt can give them any title.

That a man, by the general doctrine of the law of England, is protected from answering questions by which he may be criminated, has been forcibly illustrated by Lord *Eldon*, in *Paxton v. Douglas*, 19 *Ves.* 227.

The LORD CHANCELLOR: — The proposition is too clear to require an authority.

Mr. *Collinson*: — Then the case of a bankrupt must be one of exception. But as no such exception can exist without the authority of an act of parliament, it remains for me to examine the law upon this point, by reference to the statutes, and the decided cases by which their meaning has been explained. That in bankruptcy no disability attaches to any other person than the bankrupt is apparent from all the authorities. In *Bracey's* case, *Comb.* 390 (a), *Bracey* was asked when and in what manner he had assisted in embezzling the estate of the bankrupt, which might have exposed him to a penalty under the 13 Eliz. c. 7. s. 5, 6, 7.; and on refusing to answer he was committed. Lord *Holt* said: "He is not to answer any thing criminal; it is criminal to embezzle any goods after the bankruptcy, but not before;" and he discharged the prisoner. So, in *ex parte Higgins*, 11 *Ves.* 8., a solicitor, summoned by the commissioners for the purpose of proving an act of bankruptcy, refused to attend, alleging that

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(a) 1 *Salk.* 348; 1 Lord *Ray-* 5 *Mod.* 309. See also Mr. *Beames*
mond, 99; *Holt*, 94; *Carthew*, 153 *Treatise on Commitments*, 45.
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he knew of no circumstances but what had come to his knowledge professionally. Lord *Eldon* observed, that was not a reason for disobeying the summons, and directed his attendance, reserving just exceptions to any questions which the commissioners might put to him. In *ex parte Symes*, 11 *Ves.* 521, *Symes* presented a petition for liberty to prove the amount of a bill of costs, although he had previously declined to inform the commissioners whether he had or not received any money, not specified in such bill, and he did this on the ground that a disclosure would have a tendency to criminate himself. Lord *Eldon* stated it to be a clear proposition, that no man could be compelled to answer what had any tendency to criminate himself; but the consequence, he said, was inevitable, that if it could be established that he had received money which belonged to the bankrupt, and chose to protect himself against answering as to the application, he came under the difficulty of being unable to discharge himself of the receipt; and he dismissed the application.

A bankrupt under examination is not to be placed in a more disadvantageous situation than any other person, unless by virtue of some provisions contained in the statutes, peculiar to the one, and inapplicable to the other. Before the passing of the 6 Geo. 4. c. 16., the only acts in force making any mention of the commitment of a bankrupt by commissioners, as the result of an examination, were the 1 Jac. 1. c. 15., and the 5 Geo. 2. c. 30. The 7th and 8th sections of the 1 Jac. 1. c. 15., are in these words:—“VII. And that it shall be lawful for the said commissioners, or the greater part of them, to examine the said offender or offenders, upon such interrogatories touching the lands, tenements, goods, chattels, debts, bills, bonds,

books of account, and such other things, as may tend to disclose his, her, or their estate, or their secret grants, conveyances, and eloining of his, her, or their lands, tenements, goods, money and debts, as they shall think meet."

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" VIII. And that if therein the offender or offenders shall refuse to be examined or to answer fully to every interrogatory to him to be ministered by the said commissioners, or the greater part of them, it shall be lawful for the said commissioners, or the greater part of them, to commit the said offender or offenders to some strait or close imprisonment, there to remain until he, she, or they shall better conform him or herself."

But as a bankrupt may make a secret grant, or remove his property, under circumstances not amounting to an indictable offence, it follows that nothing is contained in these sections, which necessarily calls upon him to answer questions by which he may be exposed to a criminal prosecution. From the 5 Geo. 2. c. 30., the bankrupt is entitled to still greater protection when under examination by commissioners. The 16th section is as follows: " It shall and may be lawful to and for the said commissioners, or the major part of them, to examine, as well by word of mouth as on interrogatories in writing, all and every person and persons, against whom any commission of bankrupt is or shall be awarded, touching all matters relating to the trade, dealings, estate and effects of all and every such bankrupt and bankrupts, and also to examine, in the manner aforesaid, all and every other person duly summoned before, or present at any meeting of the said commissioners, or the major part of them, touching all matters relating to the person, trade, deal-

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ings, estate and effects of all and every such bankrupt and bankrupts, and any act or acts of bankruptcy committed by him, her, or them, &c.’ The bankrupt is here put upon a footing equal to that of any witness. The commissioners are restricted to such questions as are lawful; and by the 18th section of the same statute the bankrupt is allowed a writ of *habeas corpus*, when the Court is to decide whether all lawful questions have been fully answered. But of what legal objection is it possible for a man to take advantage, who is precluded from saying that he is not compellable to admit his own guilt? The bankrupt is not permitted by this statute to be asked as to an act of bankruptcy, which, however, is not a crime of itself, nor an act necessarily leading to the commission of any crime, yet, inasmuch as it brings a person within the influence of a peculiar code of penal enactments, it is required to be substantiated by independent testimony. What can more clearly shew the absence of all intention to deprive a bankrupt of the right of objecting to criminate himself than a statutable protection, provided, when he could have no other, in a case bearing only incidentally, contingently, and prospectively, on the point of criminality?

Such was the statute law previously to the passing of the 6 Geo. 4. c. 16.; and such it is still, for that act adopts, in substance, with respect to witnesses, the terms of the 5 G. 2. c. 30., and re-enacts, as to the bankrupt, the provisions of the 1 Jac. 1. c. 15., and 5 Geo. 2. c. 30. The 6 Geo. 4. c. 16., indeed, although it makes no alteration as to the points upon which a bankrupt may be examined, contains a novel enactment relative to time, by permitting the examination to take place “whether the bankrupt shall have

obtained his certificate or not" (a) — words to be met with in no previous statute. But it may be said that inasmuch as a bankrupt who, at the time of obtaining his certificate, had concealed property of the value of 10*l.*, must have committed a felony, the commissioners are empowered to examine him relative to such felony. This, however, by no means follows. It is not every concealment that would constitute a felony; nor does the statute say that he shall answer as to a felonious concealment. So far from this, it directs the commissioners to allow all lawful objections; and the Court above is required, on *habeas corpus* (b), to determine whether all lawful questions have been fully answered, whilst no new rule of evidence is provided, to make that lawful which would otherwise be the contrary. But whatever doubts may exist as to whether a bankrupt may or may not, under the peculiar provisions of the 6 Geo. 4. c. 16., be required to answer to a felonious concealment, such doubts can have no influence in a case alleging no concealment, and seeking for no disclosure of property. Disembarrassed of this difficulty, if it be one, no obstacle exists on the face of the statutes to the right now asserted by the prisoner, of being within the protection of that general principle, which protects a man from becoming the unwilling instrument of his own crimination.

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The cases to be met with in the books, although usually cited against the liberty of a bankrupt, will be found, upon consideration, to be not unfavorable to the prisoner. They are as follows: *ex parte Meymot*, 1 *Ath.* 196; *ex parte Nowlan*, 11 *Ves.* 510; *ex parte*

(a) 6 Geo. 4. c. 16. s. 36.

(b) 6 Geo. 4. c. 16. s. 39.

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Oliver, 1 *Rose*, 407., and 2 *V. & B.* 244; *ex parte Cosens*, *Buck*, 531; and *Pratt's Case*, 1 *G. & J.* 58.

Ex parte Meymot, 1 *Ath.* 196, was the case of a clergyman applying for a supersedeas on the ground that, as it was illegal for a clergyman to engage in trade, any examination would expose him to the necessity of criminating himself. Lord *Hardwicke* observed, that a man could not take advantage of his own wrong, or avail himself of the breach of one law to avoid the operation of another, and that a smuggler might be a bankrupt. "In the case," said his lordship, "I put before of smuggling, there is no examination of the commissioners but will subject to penalties; and yet that is no reason why the commission should not proceed, for if the bankrupt has an objection to the question, he must demur to the interrogatories, and this Court will judge of the question upon a petition; or if the bankrupt refuse to answer any question, and the commissioners commit him, and the delinquent brings an *habeas corpus*, the question must be set forth particularly in return to the *habeas corpus*, that the judges may judge whether it was a lawful question or not." Can it be supposed that Lord *Hardwicke* would have referred the petitioner to a *habeas corpus*, if that writ could afford him no protection against the object of his apprehension?

Ex parte Nowlan, 11 *Ves.* 510, was the case of a bankrupt, committed for unsatisfactory answers, who, when before the Lord Chancellor, objected to the questions as of a tendency to make him criminate himself, although no such objection had been taken before the commissioners. Lord *Eldon* made the following observations: "As to the ground of this application, that the questions tend to make him accuse himself, in the administration of this part of the

justice of the country, that case must be distinctly brought before the Court in another manner. The bankrupt must, before the commissioners, make his objection; so that the Court, upon the application, may distinctly see the nature of it; for a man may, if he chooses, waive his objection to answer any question, and may answer, and bankrupts often do answer questions they are not bound to answer, and perhaps prudently; as in many instances the utmost severity of the law may be applied; and they may redeem themselves from the inclination to prosecute. As, therefore, it is in the power of the bankrupt to answer, or to demur, the course upon application to be discharged upon this ground is, that, being before the commissioners, he must demur to the question, and then the state of the proceeding, upon the return to the *habeas corpus*, must be accurately brought before the Court; and that course not being taken in this instance, it would be very dangerous to discharge the bankrupt." Here Lord *Eldon* admits that there are questions which a bankrupt is not bound to answer, and to which he may demur before the commissioners; questions which connect themselves in prospect with a prosecution, and which have, therefore, a tendency to criminate him.

Ex parte Oliver, 1 *Rose*, 407, 2 *Ves. & B.* 244, was the case of a bankrupt who admitted to the commissioners that he had paid a sum of money to prevent the disclosure of a circumstance which he mentioned; but he gave so unsatisfactory an account of the transaction that he was committed. This case would be of little importance to the present inquiry but for the circumstance that Lord *Eldon* lays it down, extra-judicially indeed, that a bankrupt is not bound to criminate himself, qualified by some observations neither

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compatible with the universality of such a proposition, nor material to the prisoner. The words are these: (a) "He is not bound to answer a question that has a tendency to accuse him of a criminal act; but he must submit to the consequence of that refusal being unsatisfactory, as there is nothing unlawful in this question upon the face of it. That, however, is not this case, as this person admits the criminality. He does answer the question." When a question, apparently innocent, though really otherwise, is demurred to by a bankrupt, who swears that an answer would expose him to a criminal prosecution, is it intended to say that he must nevertheless answer or suffer perpetual imprisonment? Little dexterity being requisite to frame a question so that the criminality to be elicited shall appear exclusively upon the answer, this would be to degrade the "lawful questions" spoken of in the statutes into useless words. Would any one feel anxious about the form, who was unable to escape from the substance of an examination? Of what moment would it be to a bankrupt, whether his offence be wholly disclosed by the answer, or appear in the question also? To say that he need not answer, as he may prefer to be punished for contumacy, is in effect to destroy all protection.

In *ex parte Cossens*, *Buck*, 531, the bankrupt *Worrall* had resigned, on the eve of his bankruptcy, the situation of town clerk of the city of Bristol; and on being asked by the commissioners, whether any consideration had been paid to him for resigning that office, which was not legally saleable, declined to answer. The question not having been persisted in by the commissioners, *Cossens*, a creditor, presented a petition for the purpose

(a) 2 *Ves. & B.* 250.

of enforcing an examination to that point. Lord *Eldon* observed, that the creditors might of themselves call a meeting of the commissioners, in order to examine into the state of the property, and to have it distinctly answered, whether *Worrall* had any property consisting of any bond, security, or engagement, or any thing else which he received, either before his bankruptcy or since his bankruptcy, other than that which he had already particularly disclosed; and he apprehended they might ask him whether he had the bond of *A. B.*, or the bond of *C. D.*, or the bond of *E. F.*, and so on, but he did not think they could couple that with questions relating to the illegal consideration.

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The LORD CHANCELLOR:—In that case you will observe that Lord *Eldon* said: (a) “I conceive that there is no doubt that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though, in the course of giving information to his creditors or assignees of what his property consists, that information may tend to shew he has property which he has not got according to law; as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to the act of parliament, except under the limitation of the late act; and the case of persons having the possession of gunpowder in unlicensed places, whereby

(a) *Buck*, 540.

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they became liable to great penalties, whether the crown takes advantage of the forfeiture or not; in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors."

Mr. Collinson.—But the decision in this very case is adverse to this supposed power, for the result was, that the Lord Chancellor declined to interfere. The petition was eventually dismissed; and the whole inference, therefore, from this case, is, that although a bankrupt may be interrogated as to the possession of property, he cannot be compelled so to answer as to criminate himself.

Pratt's case, 1 G. & J. 58, was brought before the Court of King's Bench, on an application for a writ of *habeas corpus*. The bankrupt had refused to answer some questions, put to him by the commissioners, relative to securities granted by deed, inasmuch as he alleged that such an examination had a tendency to establish an act of bankruptcy. The Court refused the writ, saying, that the bankrupt was bound to disclose all circumstances respecting his property, be the consequences what they might. The language of the Court was more extensive than the occasion required. Commissioners are not precluded from examining a bankrupt as to an act of bankruptcy, on the ground of any tendency it may have to make him criminate himself, but simply because the statutes have enumerated the objects to which he may be examined, and an act of bankruptcy is not to be found among the number. The same observation will apply to the bankrupt's wife. It was thought inexpe-

dient, probably for a reason already suggested, to allow a commission to be supported by such testimony; but so far from permitting the acknowledgment of an act of bankruptcy to interfere with the disclosure of property, the statutes of 1 Jac. 1. and 6 Geo. 4., expressly require the bankrupt to be examined to secret grants, at the same time that they make fraudulent grants acts of bankruptcy.

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The acts of parliament and the cases, relevant to this inquiry, are now exhausted, without disclosing any enactment or decision to justify the hypothesis, that the case of a bankrupt is one of exception from all others; that his treatment is to be that of an outcast from the common principles of natural justice; that he alone, of all mankind, is not to be permitted to say: "I will not be my own criminator." But even if it were to be hereafter decided, that a bankrupt may be required to become his own accuser, in cases materially affecting the interests of his estate, it would still be open to him to deprecate examination in a case like this, to which the creditors in point of interest are almost strangers.

Messrs. S. and C. (according to the memorandum annexed to the examination) succeeded, by means of the bankrupts, in obtaining fraudulent possession of the goods of Messrs. *Knatchbull* and Co. If so, Messrs. *Knatchbull* and Co. may recover the value of them from Messrs. S. and C. But for whose benefit? Their own, undoubtedly; and what they shall recover, whilst it will diminish their debt under the commission, may occasion an increase of that of S. and C. to an extent perhaps not much inferior. To-day it is a question of conspiracy; to-morrow may occur a case of capital felony; and it

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The LORD CHANCELLOR desired Mr. *Rose* to produce the authorities on the other side, upon which he relied.

Mr. *Rose*.—The commissioners are empowered to examine parties' witnesses, and the bankrupt; and, without inquiry as to the extent of their compulsory power over witnesses and parties, the question, upon this application, is, as to their authority with respect to the bankrupt, a question of great importance, because, if the commissioners do not possess this power, the whole object of the bankrupt statutes will be liable to be defeated. *Ex parte Meymot* is the first case, in which Lord *Hardwicke* assumes the existence of this power. The next case is *ex parte Nowlan*, 11 *Ves.* 514.

The LORD CHANCELLOR:— There the point did not arise; because the bankrupt, instead of demurring to the question, answered it. This is expressly noticed by Lord *Eldon*, in the passage read to the Court by Mr. *Collinson*.

Mr. *Rose*.—The next case is *ex parte Oliver*, 1 *Rose* 414.

The LORD CHANCELLOR:—

In that case, also, the point did not arise, as the bankrupt answered the question; and indeed, as far as it is applicable, it admits that there are questions which

(a) See the judgment of Sir *John Leach*, in *ex parte Burlton*, 1 *G. & J.* 32.

the bankrupt is not bound to answer. Lord *Eldon* says: "The duty of the commissioners is very shortly stated; the bankrupt must answer every lawful question; and in that there is great difficulty. If a sum of money is unaccounted for, and the bankrupt says, I will not tell what is become of it, he must thereby subject himself to the imputation of not being able satisfactorily to account, and to the consequences of that imputation. He is not bound to answer questions criminating himself; but if he refuses to give that account, his answer is unsatisfactory, within the language of the act, and he exposes himself to the consequences of it. That, however, is not the case here. The bankrupt here does not refuse to account for this money; he does answer; he says he gave the 400*l.* to silence a person whom he thought would make a discovery, which he was most materially and feelingly interested to prevent."

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Mr. *Rose*.—The next case is *ex parte Pratt*, 1 G. & J., 58, where the Court held that the bankrupt was bound to disclose all the circumstances respecting his property.

The LORD CHANCELLOR :—

This authority proves only, what cannot be doubted, that the bankrupt must disclose what he has done with his property, although such disclosure may establish that he committed an act of bankruptcy; but it does not prove that a bankrupt may be asked whether he obtained property by fraud or forgery. In the present case, it is by no means clear that the inquiry would be beneficial to the bankrupt's estate; but even if it were likely to prove advantageous, there is not any authority to shew that the commissioners may dispense with the general rule of law, that no person can be compelled to

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criminate himself; and although part of the question proposed is free from this objection, yet as it is blended with part which, if taken separately, the bankrupt could not have been compelled to answer, I am of opinion that to the question, in the very general form in which it was proposed, the bankrupt ~~was~~ entitled to demur. The commissioners ~~may~~ conduct the necessary investigation by a more particular and minute examination as to parts of the written statement, without affording grounds for the objection that has been made; and, adverting to the circumstances disclosed, I am far from thinking that such an examination would not be proper. But, under this commitment, the prisoner is entitled to his discharge.

The bankrupt was discharged accordingly (a).

(a) See a note upon this subject, 2 *Mont. & Greggs, B. L.* p. 44. Note (B x.); and Mr. *Beames'*

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L. C.
LINC. INN,
Dec. 9, 10,
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WESTM.
HALL,
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THIS petition of creditors stated that the bankrupts were engaged in mining transactions to a considerable extent, and particularly in two mines called Wheal Vohr and Wheal Vreah, in the county of Cornwall, of which mines *John Gundry* was, in December 1819, and many years previously, the purser; that in consequence of *John Gundry's* pecuniary embarrassments, it was agreed that he should assign some of his shares to trustees for the indemnity of his co-adventurers; that *John Gundry* had, in the two preceding years, realized about 5,600*l.*; that the dividends and profits, in 1818 and 1819, were less than in the preceding years, the price of tin having fallen, and more particularly in 1819, from the circumstance of the mines not being worked regularly, and to their full extent, in consequence of *John Gundry's* pecuniary embarrassments and inability to pay and employ a sufficient number of labourers; that *John Gundry's* embarrassments continuing, it was deemed advisable that he should relinquish the purser-ship, and he accordingly resigned it in favour of *Richard Tyack*, a toller under the Duke of *Leeds*, who was much connected with *Humphrey Millett Grylls*, an attorney and banker at Helston, and also steward and agent of the Duke of *Leeds*; that on the 1st of January 1820, *Tyack* was appointed and commenced to act as purser and book-keeper, and *Joseph Vivian* as manager; that in December 1819, several meetings of the creditors of the bankrupts, and of their brothers *William* and *James Gundry*, who had also an interest in the mines, were held, when it was agreed that an assignment of the

The assignees of a bankrupt may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate; and even in relinquishing the bankrupts' interest therein as a *damnosa hereditas*; but however pure their motives, neither assignees nor commissioners can be permitted to possess themselves, by purchase or otherwise, of any part of the bankrupts' interest in such property. Against all transfers of the bankrupts' estate, either to the assignees or commissioners, the rule of the Court is uniform and inflexible. An assignee ought not to act as solicitor under the commission.

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estate of the four brothers should be made to trustees, for the benefit of their creditors generally, which was considered the more desirable, on account of the shares which *John, William, and James Gundry* held in Wheal Vohr and Wheal Vreah, from whence it was expected there would be returns in their favour, sufficient to discharge all their debts, provided they could obtain time from their creditors to allow of the sale of the ores then dug and raised, or which might be raised, if the mines were fully worked; that at a meeting of the creditors at Helston, in the middle of January 1820, which some of the Penzance creditors attended, the Helston creditors, although they admitted the expediency of the proposed measures, refused to adopt them, and determined, under the professional advice of the said Mr. *Grylls* and a Mr. *Rogers*, to take out commissions of bankruptcy against the four brothers; that a joint commission was afterwards issued against *Thomas and John Gundry*, and another joint commission against *William and James Gundry*; that the petitioning creditor, *Coulson*, under the commission against *Thomas and John Gundry*, was a client of the said Mr. *Rogers*; that on the 9th of February 1820, *Grylls* and *Charles Read*, a client of *Rogers*, were, under the influence of *Grylls*, chosen assignees under that commission; that *Rogers* and *Grylls* had, some time previously to the choice of assignees, determined that *Grylls* and *Read* should be assignees, and that *Grylls* exerted the influence he possessed over most of the creditors, at Helston, where the commission was executed, and thereby procured himself and *Read* to be chosen assignees under both commissions; that on the 18th February 1820, *Grylls* and *Read*, as assignees, signed, in the cost book of the Wheal Vohr and Wheal Vreah mines, an absolute relinquishment of all the bankrupts' shares and interest in the mines, without any con-

sideration, and without the concurrence of the trustees under the said trust deed, or of the creditors, and without having first offered the shares for sale, or having the mines inspected, or laying their situation before the creditors, and consulting them thereon; that a month after the relinquishment, *Grylls* spoke of it, in *Gundry's* presence, as a thing advisable to be, but not then done; that by the Stannary laws, if an adventurer in mines relinquish his shares before the expiration of any month, he is liable for the costs, and entitled to the profits of such shares during the current month; that *Grylls*, at the relinquishment, indemnified *Read* from all the consequences thereof, and after the relinquishment interfered in the management of the mines, and contemplated becoming an adventurer therein on his own account, which was his intention when the relinquishment was made, and was the true reason for it; that on 23d March 1820, a petition was presented to the Vice-Warden of the Stannaries by one *Scott* and others, against *Tyack* the purser, to recover a sum of 2,570*l.* for goods sold for the use of the adventurers in Wheal Vohr; that it was arranged that this petition should be converted into an amicable suit, and made the ground of an application to the Vice-Warden, to decree the payment of the sum claimed by the petitioners, and a sale of the mines for that purpose, whereby the respondent would be discharged from liability; that the Vice-Warden, on the 9th May 1820, pronounced a decree in the suit, to which all the adventurers (except the trustees under the trust deed) had, by consent, been made parties, decreeing that there was due to the petitioners the sum of 2,897*l.*, and with consent of the attornies and advocates of the defendants, that the mine, &c., should be sold, under the direction of the secretary of the Court of the Vice-Warden, by public survey or outcry, towards the payment of the said sum of 2,897*l.*;

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that in consequence of an arrangement between *Grylls* and *Carne, Edwards*, without notice, proceeded to a sale of the mines at the Prince's hall, where the Vice-Warden's Court is held; that *Grylls* was the only bidder, and was declared the purchaser; that immediately after the sale a report of the sale was made, which was, upon motion, by consent, in the Vice-Warden's Court, confirmed the same morning; that the mines were and have been in an improving state ever since their relinquishment by *Grylls* and *Read* as assignees, and that no division of costs had been made for four or five years previously to the sale; that the new adventurers have, since the sale, divided profits to the amount of 32,500*l.*, and that *Grylls* has now in his possession an accumulated capital of 40,000*l.* on account thereof, and that the mines of copper, tin, materials, &c. are of the value of at least 100,000*l.*; that Mr. *Plomer*, the quorum commissioner named in the commissions, who is much connected with *Grylls* as town clerk of Helston, and otherwise, now stands as an adventurer in the mines for one share of 100*l.*, being part of eleven fifty-fourth shares, which were secured by *Grylls* for himself and friends; that no dividend has been made, and that without the interference of the Court it is not likely that any will be made. Under these circumstances, the petition prayed that *Grylls* and *Read* might be restrained from further acting as assignees under the commission against *Thomas* and *John Gundry*, and might be removed; that other assignees might be chosen, and that *Grylls*, *Read*, and *Rogers*, might be restrained from voting in such choice; and that *Grylls* and *Read* might account before the master for what had come to their hands in respect of such estate, and for what, without their wilful default, might have been possessed; and that *Grylls* and *Read* might be declared to be personally

liable to the bankrupt's estate for all loss occasioned by the relinquishment; and that the commissioners might be restrained from acting as commissioners, and for a supplemental or new commission, if necessary. This case was argued at great length, upon the particular facts, but as the judgment chiefly turned upon the law of the case, it has been considered sufficient to state concisely the substance of the arguments.

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Mr. Sugden, Mr. Sidebottom, and Mr. Knight for the petition:—

As to the law, it is settled by a variety of cases, that neither a commissioner nor an assignee can buy for his own benefit, or for the benefit of any other person, *ex parte Reynolds*, 5 Ves. 707; *ex parte Lacey*, 6 Ves. 625; *ex parte Hughes*, 6 Ves. 617; *ex parte James*, 8 Ves. 387; *ex parte Bennett*, 10 Ves. 381. In these cases Lord Eldon has declared, that the rule must be applied with unrelenting jealousy in the cases of assignees of bankrupts' estates, and that whenever assignees purchase they must expect an inquiry into the circumstances. In *ex parte Reynolds*, 5 Ves. 707, an assignee purchasing the estate himself, or permitting his co-assignee to purchase, was held to be a sufficient cause of removal. (a)

As to the facts, they contended that there was not any meeting of creditors or order of the Court; but that the purchase was the result of a preconcerted plan to obtain dominion over the mine by issuing a commission of bankruptcy; that although the mine, at the moment of the bankruptcy, was embarrassed, it was only a temporary difficulty; and that within a year after it had

(a) See also *ex parte Lewis*, 1 G. & J. 355; *Sugden's Vend.* 1 G. & J. 69; *ex parte Buxton*, and Purch. (6 edn.) p. 570.

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been purchased by Mr. *Grylls*, it became and continued to be a most profitable concern.

Mr. *Horne*, Mr. *Montagu*, Mr. *Wray*, and Mr. *Sandys*, for the respondents, contended, that although it may be a general rule that assignees should not purchase for themselves property, which they had elected to take as assignees, yet that there was not any rule, that an assignee could not purchase property which had been properly rejected as "*damnosa hereditas*." The question, therefore, in the present case, was merely whether the mine had been properly abandoned, and of this no doubt could be entertained. When the commission issued, the mine was indebted to the amount of 10,000*l.* and upwards; all the proprietors were at variance, and in the greatest perplexity; it was on the eve of stopping; the monthly outgoings were 3,000*l.*; different adventurers had relinquished their interests; and there had been meetings of the proprietors, who had endeavoured to sell the mine, but without being able to find purchasers; that these facts were stated to the creditors at the two most public meetings, at which the petitioners were present, the meeting for the choice of assignees, and the third meeting; and that the opinion of an eminent counsel was taken as to the propriety of accepting or rejecting the mine. Under such circumstances, without the possibility of raising 3,000*l.* a month, which was necessary to keep the mine in operation, it could not have been proper to have accepted it. The propriety of the abandonment was clear. Assuming, then, that it was proper, what objection could there be to the purchase by Mr. *Grylls*? As to this point, if the particular circumstances of the case were considered, it would appear that the purchase was deserving not of censure, but of praise. The assignees had resolved not to take the mine, and the consequence

must have been, that about 1,000 miners would, at a moment's notice, in the winter of 1820, when there was great distress in the country, have been thrown out of employment. To prevent this evil, it was proposed, at a meeting of the noblemen and gentlemen of the county, that the mine should be kept at work by their each taking one or more shares, not with any hope of gain, but with the fear and almost certainty of loss; that the shares had been divided between the Duke of Leeds, Mr. Trelawney, Mr. Plomer, and other gentlemen; that Mr. Grylls had three shares, which he took only from the same motives by which the other gentlemen were actuated, and of which he would most gladly have disposed; that this interposition met with the approbation of the creditors, the petitioners, and the public throughout the county; and that no complaint had been made until the year 1825, when the mine turned out to be profitable; that these facts were within the knowledge of the petitioners at the time of the transaction; and the Court, therefore, would hardly permit them, after the lapse of five years, to impeach it.

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The case stood over until the 8th of July 1829, when the Lord Chancellor delivered Judgment as follows:

THE LORD CHANCELLOR:—

This case is of great importance, not only from the principle involved in its consideration, but from the extent of property which depends upon the result. I have read with attention the voluminous affidavits that were referred to by counsel, in the course of their arguments at the bar; but, from the view which I take of the case, it will not be necessary for me to enter into a minute examination of all the circumstances which are there detailed; it will not be necessary, because my

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1829. judgment is founded on facts not in controversy between the parties.

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There has been no principle more wisely laid down, more universally recognized, or more rigidly adhered to by my predecessors in this Court, than that assignees of a bankrupt's estate shall not be permitted, either directly or indirectly, by themselves or by any circuitous mode, to become the purchasers of any part of the bankrupt's property. It matters not by what motives the parties may be actuated. They may be influenced by motives of the purest and most honourable character; but it must not be forgotten that the motives of mankind can seldom be satisfactorily inquired into, whilst, on the other hand, there is danger to be apprehended from fraudulent practices, the proof of which is at all times difficult and uncertain. The rule of the Court on this subject, is forcibly and distinctly stated by Lord *Eldon*, in *ex parte Bennett (a)*, one of the latest of a series of cases by which the principle in question was recognized and confirmed. His Lordship there said: "With reference to assignees under a commission of bankruptcy, I have repeatedly thought upon this subject. The firmness with which I have acted upon it in bankruptcy, has brought into difficulty persons who did not suppose they were liable to it. I have not the least doubt that assignees cannot purchase for themselves; and I think, if the rule can be applied to any class of trustees, it applies with more force to them than to any other description; for there are in other cases many *cestuis que trust*, much more able to protect themselves than the trustees: but that is not so with regard to the bankrupt or the creditors. There is more temptation to let the assignee wrong them than to

(a) *Ex parte Bennett*, 10 Ves. 381.

disturb him in the enjoyment of the fruit of his misconduct." (a). And in a subsequent part of the same judgment, in again adverting to the principle, Lord *Eldon* observed: "Upon the general rule, both the solicitor and the commissioner have duties imposed upon them that prevent their buying for themselves; and if that is the general rule, it follows of necessity, that neither of them can be permitted to buy for a third person; for the Court can with as little effect examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other. No court of justice could institute investigation to that point effectually in all cases; and therefore the safest rule is, that a transaction, which under circumstances should not be permitted, shall not take effect upon the general principle; as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases." (b)

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I have referred to these parts of the judgment in *ex parte Bennett*, because it is one of the latest cases, confirming numerous previous decisions, in which it was settled as a broad and uniform rule of this Court, that a trustee shall not purchase the property of his *cestui que trust*, and that an assignee shall not possess himself, by purchase or otherwise, of the estate of the bankrupt. It is almost impossible to sift the circumstances of each particular case; and on that account, however upright the transaction may appear, the Court will withhold its sanction from the sale.

With respect to the material facts of this case, it appears that *John Gundry* was the proprietor of several

(a) 10 Ves. 395.

(b) 10 Ves. 400.

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shares in the mines, called Wheal Vohr and Wheal Vreah, in the county of Cornwall. About the end of the year 1819 he became embarrassed, and in January 1820 was declared a bankrupt. On the 15th of February following, Mr. *Grylls*, a solicitor, and Mr. *Charles Read*, were chosen assignees; and three days afterwards, these gentlemen relinquished all the interest of the bankrupt in the mine, reserving only his interest in the machinery belonging to the mine, the debts owing to it, and the produce of the mine then above the surface, or severed from it below, and on the premises. About the end of March, or early in April, and in consequence, it was said, of the opinion of counsel, that they would subject themselves to personal liability, the assignees further relinquished the bankrupt's interest in the materials which they had at first reserved. In the course of the inquiry, and of the argument, there has been much contest as to the fairness of this relinquishment; but after examining the affidavits, and taking all the circumstances into consideration, I think that if this transaction had stood alone and insulated, I should not have been disposed to question the propriety of it, and that there would not have been sufficient grounds to justify the interference of the Court. But complaints have also been made that the creditors were not consulted; that no valuation of the property was made; and that no meeting was held for the purpose of sanctioning the relinquishment. Whether the creditors were or were not consulted is a matter of controversy; but this fact is clear, that the relinquishment was known to the creditors, and that they did not complain of it. Considering, therefore, that the mine could not be made immediately available or beneficial to the estate, I think that in point of law, and in strict propriety, the assignees were not bound to incur personal responsibility by continuing the

works, and that, looking at this transaction singly, they were justified in what they did.

The relinquishment, however, is not the only part of the case. Mr. *Grylls*, before he was elected assignee, and before he acted under the commission, had ample opportunities of informing himself of the actual state of the mine, and of its value. On the 5th of February, it appears that a meeting of the mine adventurers was held, at which it was determined that one half of the mine should be disposed of; and in order to protect the new purchasers from any liability, in respect of existing claims on the mine, it was agreed that the sale should be effected through the medium of a decree of the Vice-Warden's Court. In this arrangement, it was proposed that the shares of the bankrupt should be applied in a particular way. On the 15th of February, the assignees were chosen. On the 16th, another meeting of the mine adventurers was held to complete the arrangements previously proposed. Two days after this, the assignees released all the bankrupt's interest in the mine, and five days afterwards, another meeting of the old and new adventurers was held, at which it was agreed that Mr. *Grylls* should take a certain proportion of shares in the mine. This proportion was eventually settled to be eleven 54th shares for himself and friends.

In the month of June, these transactions were completed. It was agreed that 18,000*l.* should be paid for the mine and materials, which was something more than the valuation of the materials; the proposed decree was taken by consent in the Vice-Warden's Court, and Mr. *Grylls* became possessed, for himself and his friends, of eleven 54th shares in the new adventure. Looking at all the circumstances, it is clear that Mr. *Grylls* had,

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before the relinquishment, contemplated the formation of a new company or adventure, and by the effect of the arrangement, he became possessed, although not specifically, yet substantially, of some part of the interest of the bankrupt. The transfer was accomplished, for valuable consideration, through the medium of the Vice-Warden's Court; but this must be regarded as an indirect contrivance, which can neither be sanctioned nor permitted here. Mr. *Grylls* can hold this interest in the mine, in no other capacity than as a trustee for the creditors of the bankrupt, and the fact that he now holds a less interest than that formerly possessed by the bankrupt, can make no difference in principle.

It is said that Mr. *Grylls* was actuated throughout by the purest and most disinterested motives, and that without his exertions the working of the mine would have been stopped, and one thousand labourers, employed there, thrown upon the parish, to the great injury of the landowners in the neighbourhood, for many of whom Mr. *Grylls* acted as agent. Supposing these facts to be as they are represented, they may vary the case as to the moral honour and integrity of the parties concerned, but they cannot vary the rule of the Court applicable to such transactions.

It has been also urged that the mine was a losing concern, when Mr. *Grylls* engaged in it, and that he incurred great risk. It must be remembered, however, that he had peculiar means of ascertaining its exact value; and although it be true that it was not at first productive, it became so immediately afterwards; within little more than a year the greater part of the capital embarked was paid off; and from that period to the present, the mine has proved highly productive to the

proprietors. But it was further contended that the profits have arisen, not from pushing on the works in the old levels, but from establishing new works, from the use of new machinery purchased with new capital, and from the lord's yielding to the adventurers some part of his dues. All this may be perfectly correct ; but these circumstances are only slight ingredients in the case, and cannot be permitted to vary the strict and wholesome rules of the Court. *Mr. Grylls* must, therefore, be declared a trustee for the benefit of the bankrupt's estate, and as such, must account for the profits made by him. The same principle will apply to *Mr. Plomer*, a commissioner, who took some share, and he also must account.

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There is another part of this case to which I feel bound to allude. I am of opinion that an assignee is not entitled to act as solicitor to the commission. It is part of the assignees' duty to direct and controul the proceedings of the solicitor, and if the offices be held by the same individual, that check must necessarily be lost. I think, in reason, and upon principle, that the same person should not be permitted to fill two offices, one of which is in its nature responsible to the other. (a)

An assignee
ought not to
act as solicitor
under the com-
mission.

(a) The Lord Chancellor's order directed, amongst other things, that a renewed commission should be issued, directed to commissioners named in the order; the discharge of *Mr. Grylls* and *Mr. Read* from being assignees; a choice of new assignees, and that *Mr. Grylls* and *Mr. Read* should be restrained from voting in such choice: It further declared and directed, that *Mr. Grylls* and *Mr. Plomer* should be con-

sidered as trustees, for the benefit of the creditors, of all the shares or parts of shares in the mines taken and retained by them, and that they should account accordingly before the Master; that the taxed costs of the petitioners should be paid by *Mr. Grylls* and *Mr. Read*; and that the extra costs of the petitioners should be paid out of the estate of the bankrupts.

L. C. *Ex parte* BEESTON.—In the matter of WHITE
 LINC. INN, and another.
 July 30,
 1829.

The Court will not assume that commissioners of bankrupt are likely to exceed the authority vested in them.

Where a mortgagee of the bankrupt's property, who was summoned to attend before the commissioners, petitioned that they might be restrained from requiring the production of the mortgage deed, the petition was dismissed with costs, as being premature.

THE petitioner stated, that *White* had, previously to his bankruptcy, executed to him an indenture of mortgage of certain leasehold premises, as a security for the sum of 4,900*l.*, or any floating balance, and that 3,500*l.* was now due to him; that he had been summoned to attend and produce to the commissioners the mortgage deed, and required to give a copy to the assignees, but that, as mortgagee, he was advised he was not bound to shew his mortgage deed, or any of his securities, until paid the principal and interest due thereon. The petition, therefore, prayed that the assignees might be restrained from making any application to the commissioners, to compel the petitioner to produce his mortgage securities, and that the commissioners might not be permitted to require such production.

The *Solicitor-General* and Mr. *Montagu* for the petition :—

Although the power of limiting the examination of commissioners is to be exercised with reluctance, there have been cases in which the Lord Chancellor has directed them to confine their inquiries to a particular mode, or to particular points. *Ex parte Parsons*, 1 *Atk.* 204; *ex parte Bland*, 1 *Atk.* 205; *ex parte Bryant*, 1 *V. & B.* 214; 2 *Rose*, 3. If the interference of the Court be at any time requisite, it is peculiarly so, in the present instance, where a mortgagee may be exposed to commitment for refusing to shew his mortgage security until what remains due to him is paid. There is no

Mont. 55.

general rule more clearly settled than that a mortgagee, equally with a purchaser for valuable consideration, is not compellable to produce his title deeds. *Duchess of Chandos v. Brownlow*, 2 *Ridg. P. C.* 422. (a) Lord *Kenyon*, when sitting at *Nisi Prius*, was in the constant habit of stating to persons who attended as witnesses, under a *subpœna duces tecum*, that they were not bound to shew their title deeds; and the principle is equally applicable in bankruptcy. The assignees have the same remedies as other persons; they may pay the money claimed into Court, and then apply for an inspection of the deed. No case can be cited to justify the course they are now proposing to pursue; and the words of the 6 Geo. 4. c. 16. s. 33 and 34. are not wide enough to give the authority which is claimed.

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The LORD CHANCELLOR: — Suppose a case of fraud to be shewn, either by a preliminary inquiry, or by reference to the deed itself, by erasures, or by material alterations of the dates.

For the petition: — In such cases, the assignees have their remedy, by filing a bill in the ordinary way, and on motion, no doubt the Court would direct an inspection of the deed. The objection here is to the summary jurisdiction of the commissioners, and to their demand that the deed should be produced.

Mr. *Rose* and Mr. *Macarthur* *contra*: —

This application, *quia timet*, to limit the examination of the commissioners, is neither supported by the cases

(a) The cases in this subject edition of *Powell on Mortgages*, are collected in Mr. *Coventry's* vol. ii. p. 629, &c.

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cited, nor justified by any circumstances which have been stated. In both the cases of *ex parte Parsons* and *ex parte Bland*, it appears that Lord *Hardwicke* refused to limit or restrain commissioners in their examinations; and in the later case of *ex parte Burlton*, 1 G. & J. 30., the Court refused a similar application, in which it was alleged that the object of the examination was to procure evidence against the parties examined as to penalties incurred by gaming. There the Vice Chancellor (Sir *John Leach*) said: "The object of this petition is, that the general authority which the law gives to the commissioners to examine persons for the discovery of the bankrupt's estate may, in this particular case, be restrained; and the reason given is, that the petitioner may, by his examination, be made subject to penalties. I can neither assume that the commissioners will not do their duty (a), nor that the petitioner will not find a sufficient protection in the rule of law which enables him to refuse to answer questions tending to criminate him, or to expose him to penalties." So in this case, the Court will hardly assume that the petitioner, if he have any lawful objection to urge against the production of the mortgage deed, will not find just and reasonable protection from the commissioners.

Previously to the late act, it was Lord *Eldon's* constant practice to make orders directing parties to attend with deeds before the commissioners. *Ex parte Treacher, Buck*, 17; *ex parte Law, Buck*, 110. The statute has now rendered such orders unnecessary, and has given the commissioners power to compel the attendance of

(a) The Court will not assume that the commissioners have put any illegal question, unless that appears to be so on the face of the warrant. Per *Holroyd J.*, *ex parte Vogel*, 2 B. & A. 227.

parties, and the production of deeds and other documents.

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BERSTON.
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The LORD CHANCELLOR : —

It is not, at present, necessary to enter into that part of the subject, for this application is undoubtedly premature. I cannot assume that the commissioners will exceed the authority which is vested in them, or that they will fail to discharge their duty. They must exercise their own unbiassed judgments on the case presented for their consideration ; and should that judgment ultimately prove to be erroneous, it will then be time enough for the party injured to apply here.

Petition dismissed with costs.

Ex-parte HANKEY.—In the matter of J. and T.
BRINDLEY.

V. C.
LINC. INN,
Aug. 3,
1829.

PREVIOUSLY to the 1st of December 1817, the bankrupts were in the possession and occupation of a manor and farm in the county of Kent, under a lease granted by the Dean and Chapter of Rochester, for the term of twenty-one years, from Michaelmas 1817. The demised premises consisted, in part, of two pieces or parcels of land, in which there was a large quantity of brick earth, and by an indenture of the 1st of December 1817, the Dean and Chapter granted a licence to the bankrupt, for a term of seven years, to be computed from the 29th of September 1817, to dig and take earth and soil from the said two pieces or parcels of land, and to make and burn the earth and soil into bricks, and to carry away the same when made. By another indenture of the 1st of January

Payments agreed to be made by an occupier of the soil under a parol licence to dig earth and make bricks, are in the nature of rent, and as such a mortgagee of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may become due afterwards.

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1824, the Dean and Chapter demised the said manor and farm, (including the said two pieces or parcels of land,) to the bankrupts, their executors, administrators, and assigns, for the term of twenty-one years, to be computed from Michaelmas 1823; and by another indenture of the 9th of January 1824, the bankrupts, with the licence and consent in writing of the Dean and Chapter, assigned to the petitioner, by way of mortgage, the said manor, farm, and premises, comprised in the said indenture of the 1st of January 1824, as a security for the repayment to him of the sum of 14,000*l.*, with interest at the rate of five per cent. payable on the 9th of January and 9th of July in every year. From the date of the licence of the 1st of December 1817, the bankrupts and those claiming under them had been permitted by the Dean and Chapter to dig brick earth from the before-mentioned pieces or parcels of land, and on the 18th of March 1825, the bankrupts entered into a written agreement with Messrs. Pelham and Barton, authorizing them, during the then present year, to dig earth and make bricks on the said two pieces or parcels of land, on payment of certain sums therein specified, varying according to the quantity of bricks to be made, and on condition, that the amount which might thus become due, should be paid on or before the 29th of September then next, or within fourteen days after, and that in case of default, the bankrupts should be at liberty to distrain upon the bricks remaining on the ground. Upon the expiration of this agreement, no new arrangement was entered into, but Messrs. *Pelham* and *Barton*, and afterwards *Barton* alone, were permitted to dig earth and make bricks upon the same terms. On the 25th of February 1826, a commission issued against *J. and T. Brindley*, under which they were declared bankrupts, and the usual assignment and a bargain and sale of their real estate were made to

the assignees. On the 2d of October 1826, the bankrupts having made default in payment of the interest from the 9th day of July 1824, the petitioner caused a notice to be served on *Barton*, requiring him to pay to the petitioner, as mortgagee, all rent and arrears of rent which then was or were, or should or might be or become due from him, for the said brick field or ground; and the petitioner also caused similar notices to be served on the tenants of other parts of the mortgaged premises. In January 1828, all the mortgaged premises were sold, with the consent of all parties, for the sum of 12,356*l.* 13*s.* 4*d.*, which left a considerable balance owing to the petitioner; and it being found that a sum of 239*l.* 7*s.* 7*d.* had been paid by *Barton* "on account of what, on the said 2d day of October 1826, was, and of what between that time and the period of the said sale had become due from him," according to the terms of the said agreement, a question arose between the assignees and the petitioner as to the right to the above-mentioned sum. The petition prayed that the petitioner might be declared to be entitled to the said sum of 239*l.* 7*s.* 7*d.*, and that the same might be paid to him.

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HANEY.
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of
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LEY.

Mr. *Turner* for the petition: —

The payments due from *Barton*, who was in the actual occupation of the soil for the purpose of brickmaking, must be considered as in the nature of rent, and as such the mortgagee would be entitled to all the rent in arrear, at the time of his notice, on the 2d of October 1826, and to all that accrued due until the sale of the mortgaged premises. In *Keech v. Hall*, *Doug.* 21, it was decided that a mortgagee might recover in ejectment, against a tenant who claims under a lease from the mortgagor, granted after the mortgage, without privity of the mort-

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gagee (a); and in *Moss v. Gallimore*, Doug. 279, it was determined, that if a mortgagee give notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, he is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and that he may distrain for it after such notice. This case was afterwards fully confirmed in *Birch v. Wright*, 1 T. R. 378. (b)

Mr. Preston contra : —

The payments to be made by *Pelham* and *Barton*, and afterwards by *Barton*, were not in the nature of rent: they were payments in respect of the price of the estate or soil sold to them. It is clear that the mortgagee could not have distrained for the amount due, nor could the mortgagor have distrained after the expiration of the period, specified in the written agreement giving the right of distress. Then if a distress could not be levied, the money could only be recoverable by action; but what action could the mortgagee have maintained? He could not have brought trespass, trover, or debt, nor could he have maintained an action for use and occupation. The assignment to him was independent of the

(a) See also *Thunder v. Belcher*, 3 East, 450.

(b) A mortgagee having given notice to the tenants holding the mortgaged premises under leases, granted by the mortgagor after the mortgage, is entitled to receive from those tenants, the rents actually due at the time of the notice, as well as those which accrued due afterwards. And where such rents had been re-

ceived by the agent of the mortgagor, after his bankruptcy, and were not actually paid over: Held, that the agent might retain such rents in order to pay the interest, accruing due on the mortgage, to the mortgagee, who had required him to do so, and that the assignees could not recover them. *Pope* and another v. *Biggs*, 9 B. & C. 245.

right to the brick earth. *Barton* was a mere occupier of the surface. The remedy, if any, would have been by an action on the express or implied contract; but between the mortgagee and *Barton* there was no privity.

This is not a case of tenancy, and the cases cited do not apply. It is a new case, in which the mortgagee has not any contract *in rem*. He has brought the difficulty on himself, by neglecting to take an assignment of the benefit of the brick earth, which was quite distinct from the title under the lease.

Mr. *Turner*, in reply, submitted, that, as between the mortgagor and *Barton*, there was clearly a case of tenancy.

The VICE-CHANCELLOR: —

In this case I am of opinion that the sum in question ought to be paid to Mr. *Hankey*. It appears, from what is stated in the petition, that a lease was made to the *Brindleys* before the 1st of December 1817; and that after this lease was made, the Dean and Chapter, by an indenture, dated the 1st of December 1817, granted a licence to the *Brindleys* to dig earth and soil for making bricks for seven years. On the 9th of January 1824, the Dean and Chapter made a new lease to *Brindleys*; and the *Brindleys* subsequently entered into an agreement with *Pelham* and *Barton*, which in effect gave them power to make bricks, by using the soil upon the land. The question then is, how that agreement is to be considered as between the mortgagee and mortgagor. It was attempted to be said, that it could not be considered as a lease, because it originated, not out of the lease from the Dean and Chapter to *Brindleys*, but out of the licence which had not been renewed; but in my opinion the true way of considering it is, as nothing more than a lease for

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2 Ves & B. 252.

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a year to *Pelham* and *Barton*, with certain privileges annexed to it. Then considering it as a lease, which it was, because *Pelham* and *Barton* had a right to occupy the soil, the consequence is, that the mortgagee, from the time he gave notice, was entitled to the rents. He was entitled to them upon the authority of *Birch v. Wright*, in which Mr. Justice *Buller* gave a very elaborate judgment, which has always been recognized as the law. I observe that after that case there was a case of *Bull v. Sibbs*, 8 *T. R.* 327, where it was held, that if *A.* agrees to let lands to *B.*, who permits *C.* to occupy them, *A.* may recover the rent in an action against *B.* for use and occupation. It appears to me, that this case is much stronger in favour of the remedy than *Bull v. Sibbs*.

The order was made as prayed: the sum received by Mr. *Hankey* to be deducted from his proof.

V. C.
LINC. INN,
August 4,
1829.

Ex parte HICKMAN and another.—In the matter of
PARKER.

Under the
6 Geo. 4. c. 16.
s. 14. when a
creditor is dis-
satisfied with the
taxation of the
commissioners,
he must present
a petition for an
order of refer-
ence to have the
bill settled by a
master in Chan-
cery. Without
such order, the
masters have no
authority to re-
tax a bill which
has been taxed
by the commis-
sioners.

IN this case, the bill of Mr. *Parton*, the solicitor to the commission, had been taxed, by the commissioners, in the ordinary manner; but the assignees, who were severally creditors for more than 20*l.*, being dissatisfied with such taxation, caused the bill to be carried into the office of the master in rotation, by whom more than one sixth was taxed off. This petition prayed that it might be referred back to the master to tax the petitioners their costs of the taxation and of the present application, and that Mr. *Parton* might be ordered to pay such costs, when taxed.

Mr. *Knight* and Mr. *Kenyon Parker* for the petition.

Mr. Rose contra :—

There has been no instance of any application similar to this. In a case from Bristol, where certain creditors were dissatisfied with the taxation of the commissioners, they petitioned the great seal for an order of reference to have the bill settled by a master, according to the directions of the 6th Geo. 4. c. 16. s. 14.; but here the parties have chosen, without any previous application to the Court, to go directly to the master's office, by way of an appeal from the commissioners; and the master has been induced, without any order of reference or authority, to allow himself to be interposed between the commissioners and the Court. He had no jurisdiction; and to recognize such a practice might lead to great inconvenience, for not only would there be frequent appeals, but not improbably appeals in the same case to different masters. Under the late act, the uniform course has been, to present a petition in the first instance to the Court.

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Mr. Knight.—Previously to the late act, the taxation of costs, up to and including the choice of assignees, was vested in the commissioners, and the taxation of all subsequent costs was directed to be made by a master in Chancery. The mode of proceeding was to leave the bill at the master's office, and to proceed at once to a taxation. But the 14th section of the late act has introduced an alteration, by giving the commissioners jurisdiction to tax all costs, whether incurred before or after the choice of assignees. The words are: "that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees (who are

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hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees, shall be settled by the commissioners; except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the court in which such business shall have been transacted; and the same, so settled, shall be paid by the assignees to such solicitor or attorney: provided that any creditor who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in Chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings and no more." Now it is clear, from this clause, that although the commissioners are interposed, an appeal to a master in Chancery is provided for; and there is nothing to shew that it was intended to vary the old practice, or to prevent dissatisfied parties from applying directly to the master for a fresh taxation.

August 14.

The VICE-CHANCELLOR:—

I have ascertained, on inquiry, that it has been the practice of some masters to tax bills of costs in bankruptcy, without an order of reference from the Court; but, advertng to the words of the statute, I am satisfied that the meaning of the legislature was, that creditors to a certain amount, when dissatisfied, should be entitled to obtain a fresh taxation, by petition to the Court, in the ordinary way. It is only by a creditor, who has proved to the amount of 20*l.* and upwards, that this right of appeal from the commissioners can be claimed;

and whether the party applying is or is not qualified by his proof, is a question which the master cannot properly try. I have also been informed, that the clause in the late act, as it was originally prepared, expressly authorized the master to tax bills, without a previous petition to the Court, but that it was altered to its present form by the recommendation of Lord *Eldon*.

I am of opinion that the master had no jurisdiction to tax the bill in this case.

Petition dismissed, with costs.

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HICKMAN
and another.
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of
PARKER.

Ex parte TURNER.—In the matter of TALBOT and FRANCIS.

V. C.
LINC. INN,
Aug. 4.
1829.

THE bankrupts, *Talbot* and *Francis*, were stock brokers. In the years 1820, 1821, and part of 1822, the business had been carried on by a partnership consisting of *Talbot* and *Dawes*; during the remainder of 1822 by *Talbot* alone; and from the 1st of January 1823, by a partnership consisting of *Talbot* and *Francis*.

A. employed B. and C. as his stock brokers, and, for the purpose of more convenient transfer, allowed certain stock, belonging to him, to stand in the name of B. alone; B., without the consent or knowledge of A., sold this stock, and paid the produce into the partnership funds of B. and C.; B. and C. having afterwards become bankrupts:—Held, that A. was entitled to prove against the separate estate of B., or against the joint estate, as he should think

Previously to 1822, *Turner*, a relation of the petitioner, employed *Talbot* and *Dawes* as his stock brokers; and, with his permission, certain stock belonging to him stood in the name of *Talbot* alone; but all his correspondence respecting this stock was with the firm, and he was credited in the books of the firm for the dividends due on the stock.

The interest in the stock vested by death, at different periods, in different persons, and ultimately vested in the petitioner.

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These different persons, as well as the petitioner, continued to deal with the new firms as they had dealt with the old.

On the 9th of August 1827, a commission issued against *Turner* and *Francis*.

After the bankruptcy, it was discovered that there had been no stock standing in *Talbot's* name since January 1824, when the stock was sold by *Talbot*, without the consent or knowledge of the petitioner. The commissioners refused to permit a proof to be made against the separate estate of *Talbot*, and adjudged that the proof should be against the joint estate. Against this decision the present petition was presented. In answer to it, affidavits were filed, on behalf of the assignees, stating, that it was a common practice with stock brokers to enter stock, purchased for a customer, in the name of one of the partners; that this was done for the more convenient transfer of the stock; that in all such cases the name of the single partner was considered as being made use of for and on account of the partnership; and that here the whole produce of the stock sold by *Talbot* had been immediately paid by him into the partnership funds of *Talbot* and *Francis*.

Mr. *Horne* and Mr. *Montagu* for the petition :—

As *Talbot* sold out the stock without the consent of the petitioner, he was, at the moment he sold it, indebted to the petitioner, if he waived the tort; and any subsequent application of it, without his consent, to the use of the partnership, may increase his right, by enabling him to elect whether he will prove against the joint or separate estate, but cannot diminish his right of proof

against the separate estate. *Parker v. Crole*, 5 Bing. 63; *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *ex parte Apsey*, 3 Bro. 265; *ex parte Watson*, 2 V. & B. 414; *Smith v. Jameson*, 5 T. R. 601; *ex parte Richardson*, Buck, 202. 421; *ex parte Clowes*, 2 Bro. 595.

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—
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TURNER.
In the matter
of
TALBOT
and
FRANCIS.

The Solicitor General and Mr. Lynch contra.

This was, in fact, stock intrusted to the firm, and placed in the name of one partner, merely for the convenience of transfer. When it was sold, therefore, and the money in the possession of the partnership, it was in the situation in which the petitioner intended to place it. *Talbot* never was a trustee of the stock, and never was considered as such by the petitioners. Nothing of that kind is to be inferred from the circumstance of the stock standing in the name of *Talbot* alone, for it is of common occurrence, that stock brokers, being directed to buy stock, place such stock, for the convenience of transfer, in the name of one of the partners.

THE VICE-CHANCELLOR:—

As the stock was sold by *Talbot* without the consent of the petitioner, he was, at the moment of sale, a debtor for the amount, and he can discharge himself only by paying it to or for the use of the petitioner: neither of which, as it appears to me, he has done.

The petitioner is, therefore, entitled to prove against the joint or the separate estate as he may think fit.

Order made for proof against the separate estate of *Talbot*, as prayed.

V. C.
LINC. INN,
August 6,
1829.

Under the
6 G. 4. c. 16.
estates, of which
a bankrupt is
seised as a bare
trustee, do not
pass to his
assignees.

The assignees
of a bankrupt
are not neces-
sary parties to
the conveyance
of an estate of
which the bank-
rupt was seised
as trustee.

Ex parte GENNYS.—In the matter of ELFORD.

THIS petition prayed that the assignees might be directed to join in conveyances to the purchasers of certain real estates, of which the bankrupt was seised as trustee for the vendor.

Mr. *Spurrier* for the petition :—

The question upon which the purchasers are desirous to obtain the opinion of the Court is, whether or not, under the late bankrupt act, a trust estate passes to the assignees of a bankrupt trustee, so as to render the assignees necessary parties to the conveyance of the trust estate. Previously to the passing of the 6 Geo. 4. c. 16. it was certainly considered clear that estates, of which a bankrupt was a mere trustee, remained in him unaffected by the commission. (a) But by the 79th section of that statute it is enacted : “ that if any bankrupt shall, as trustee, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any)

(a) See *Scott v. Surman*, *Willes*, *nell*, 3 B. & P. 40; *Gladstone v.* 402; *Winch v. Keeley*, cited *Hadwen*, 1 M. & S. 526.
1 T. R. 619; *Carpenter v. Mar-*

interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof as the Lord Chancellor shall direct." This clause, by appearing to assume, that estates held in trust pass to the assignees, has caused some doubt amongst conveyancers, and has made the purchasers in this case desirous that the assignees, as well as the bankrupt, should join in the conveyances to them.

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Ex parte
GENNYS.
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of
ELFORD.

The Solicitor General for the assignees:—

It is admitted that the bankrupt was a mere trustee of the legal estate; and the assignees, being advised, under the circumstances, that such trust estate did not pass to them, have considered it their duty to resist this application, which, if admitted, might lead to an extensive and inconvenient practice. The law on the subject was settled long before the passing of the late act; and the words of the 79th section, which have been referred to, must have been introduced inadvertently, because *Mr. Eden* himself states that trust estates do not pass by the assignment. (a)

(a) *Mr. Eden's* observations on this clause are as follows: "As equitable as well as a legal title in, and which is applicable to the trust estates do not pass by payment of his debts, the extension of the provision to real and property as the bankrupt had an personal estate may appear unne-

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Ex parte
GEMMY.
In the matter
of
ELFORD.

The VICE CHANCELLOR.—I never before knew that under this clause it had been contended that a mere trust estate becomes vested in the assignees; and if my opinion be now required, I have no hesitation in stating, that according to my view of the law, both before and since the late act, an estate of which a bankrupt is seised as a bare trustee does not pass to his assignees. No case has been made out which calls upon the Court to interfere. If it had been suggested that the bankrupt had any interest in the property, then the assignees might be necessary parties; but according to what appears at present, the petition was not founded upon any reasonable doubt, and must be dismissed with costs.

Ordered accordingly.

cessary. It may, however, be observed, that there have nevertheless been cases, as where the bankrupt is what a court of equity infers to be a trustee for his wife, in which the Court has treated an assignee as a trustee, and ordered him to join in a conveyance to a trustee for the wife, *Bennet v. Davis*, 2 P. W. 316." *Eden's Bankrupt Law*, (2d edit.) p. 244.

See also 6 Geo. 4. c. 16. s. 12. and 64., the first of which enacts, that the commissioners, by virtue of the act and of the commission, shall have full power and authority to take order and direction with all lands, tenements, and hereditaments of the bankrupt

"which he shall have in his own right before he became bankrupt," and to make sale thereof, "for satisfaction and payment of the creditors;" and by the second of which, the commissioners are directed to convey to the assignees, "for the benefit of the creditors," all lands, tenements, &c. "to which any bankrupt is entitled," &c. These clauses shew that the commissioners have, under the statute, no power to take order and direction of a mere trust estate, and that it cannot, therefore, pass to the assignees by virtue of the commissioners assignment, or a bargain and sale of the bankrupt's real estate.

Ex parte ROBINSON. — In the matter of
JACKAMAN.

V. C.
LINC. INN,
Aug. 7,
1829.

THIS was the petition of an equitable mortgagee of the bankrupt's estate, for leave to bid at the sale of the mortgaged premises.

Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the ordinary and proper practice is, that he should pay the costs of the order.

Mr. *Kenyon Parker*, for the petition, submitted to the Court, that the costs of the application should be paid out of the estate. A similar order appeared to have been made by the Vice-Chancellor in *ex parte Marsh*, 1 *Madd.* 148.

The VICE-CHANCELLOR :—I am informed that the ordinary practice at the bankrupt office is to draw up the order, directing the costs to be paid by the mortgagee, who applies to the Court for permission to bid, and I think this, which is the usual rule, the most proper one. (a)

Ordered; the petitioner paying the costs of the application.

(a) *Ex parte Ducane*, Buck, 18.; *ex parte Hammond*, Buck, 464.

V. C.
LINC. INN,
August 7,
1829.

Ex parte STEVENSON.—In the matter of
STEVENSON.

Taxed costs upon a judgment, as in case of a nonsuit, under a rule of Court, do not constitute a good petitioning creditor's debt. Such costs are recoverable only by attachment, in the nature of an execution.

THIS was a petition to supersede the commission, on the ground of the petitioning creditor's debt being insufficient in amount. The debt was composed of the following sums: 66*l.* 2*s.* upon a judgment recovered in the Court of Exchequer; 32*l.* 10*s.* 6*d.* for taxed costs upon a judgment, as in case of a nonsuit, under a rule of Court; and 5*l.* 8*s.* 4*d.* for money lent. The bankrupt had been previously attached for the amount of the taxed costs, and taken into custody.

The VICE-CHANCELLOR asked for authorities to shew that the bankrupt could, after the attachment, have been sued at law for the taxed costs; and no case being cited on the part of the respondents, to shew that an action at law could be maintained for the costs, which are held to be recoverable only by attachment, in the nature of an execution, his Honour decided that the petitioning creditor's debt was insufficient in amount, and directed the commission to be superseded.

Mr. *Rose* and Mr. *Wray* for the petition.

Mr. *Horne* and Mr. *Wright*, *contrâ*.

Supersedeas ordered.



Ex parte FRERE and others.—In the matter of
SIKES and CO.

L. C.
LINC. INN,
August 8,
1829.

THE petitioners were the members of the Clydark Iron Company in Wales, and *Sikes* and Co., the bankrupts, had been their London bankers. *Frere* and Co. had been in the habit of remitting bills on their customers, to *Sikes* and Co., and of drawing upon them in the usual mode between country and London bankers. The agreement between *Frere* and Co. and *Sikes* and Co. was: "that *Frere* and Co. should draw bills on, or make their notes and acceptances payable at *Sikes* and Co.; and in order to provide for such bills, notes, and acceptances, that *Frere* and Co. should from time to time remit to *Sikes* and Co. a competent amount of their trade bills, and that *Sikes* and Co. should be at liberty, from time to time, to discount such and so many only of the said trade bills, from time to time remaining in their hands, as should be necessary to meet and cover the amount of the bills, notes, and acceptances of *Frere* and Co., for the time being, in course of immediate payment." On the 26th November 1825, *Frere* and Co. wrote to *Sikes* and Co., and advised them of several bills becoming due in December, and inclosed a trade bill for 1,800*l*. On the 29th of November, *Sikes* and Co. wrote the following letter to *Frere* and Co.

By the terms of agreement between F. & Co. and their bankers, S. & Co., the permission to discount indorsed bills of exchange was limited to the amount, necessary to meet such acceptances of F. & Co. as were in the course of immediate payment at the house of S. & Co. To cover certain acceptances becoming due, F. & Co. remitted to S. & Co. an indorsed bill of exchange; these acceptances were, however, dishonoured by S. & Co., who soon afterwards stopped payment. S. & Co. then procured the bill to be accepted, and made an entry in their books of their having discounted it. A commission of bankruptcy having issued against S. & Co.: Held that S. & Co. had no right to discount the bill without executing the trust reposed in them, and that their assignees were bound to deliver up the bill to F. & Co.

" London, 29th November 1825.

" Messrs. *Edward Frere* and Co.

" We have to acknowledge the receipt of your favour of the 26th inst., inclosing a bill for eighteen hundred pounds, which we have placed to your account.

reposed in them, and that their assignees were bound to deliver up the bill to F. & Co.

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"In consequence of the difficulty of raising money here at present, we must beg that you will remit us nothing but banker's paper, to meet your bills falling due next month.

" *Sikes, Snaith, and Co.*"

At the close of the month of November, *Sikes and Co.* were debtors to *Frere and Co.* to the amount of 780*l.* 1*s.* 1*d.*

The bills becoming due in December were as follow: —

3d December	-	-	£ 600	0	0
5th ———	-	-	300	0	0
10th ———	-	-	300	0	0
12th ———	-	-	400	0	0
13th ———	-	-	29	10	0
19th ———	-	-	400	0	0
26th ———	-	-	400	0	0
30th ———	-	-	424	14	9
			<hr/>		
			£ 2,854	4	9
			<hr/>		

Sikes and Co. paid the bill of 600*l.*, due on the 3d December, and the bill of 300*l.* due on the 5th, and became creditors of *Frere and Co.* for 198*l.* 18*s.* 11*d.*

On the 5th of December, *Sikes and Co.* wrote the following letter to *Frere and Co.*

" London, December 5th, 1825.

" Messrs. *Edward Frere and Co.*

" We beg to refer to our letter of the 29th ult., to which we have no reply. We have paid your note, No. 129, for 300*l.*, due this day, though not provided for; but we shall not pay any of the others advised, unless you remit satisfactorily (indeed banker's paper) to meet them.

" *Sikes, Snaith, and Co.*"

On the 8th of December, *Frere* and Co. wrote to *Sikes* and Co., and inclosed two bills, the one for 1,000*l.*, at three months date, drawn by the Brecon bank on Sir *Peter Pole* and Co. of London, bankers; the other, for 250*l.* 15*s.* 9*d.*, drawn upon a customer, at six months date. This letter and the bills were received on the morning of the 10th of December. The name of *Sikes* and Co. was not on the bill for 300*l.* due on the 10th of December, but it had been paid by *Frere* and Co. to Mr. *John Frere*, who had paid it to his bankers, *Sikes* and Co. This bill was dishonoured by *Sikes* and Co., and returned to Mr. *John Frere* on the 12th of December, on which day *Sikes* and Co. wrote to *Frere* and Co. as follows :

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“ London, 12th December 1825.

“ Messrs. *Frere* and Co.

“ We have to acknowledge the receipt of your favour of the 8th instant, inclosing two bills, amounting to 1,250*l.* 15*s.* 9*d.*; but we are sorry to say Messrs. *Pole* and Co. suspended their payments this morning, and that *Wilkins* on them for 1,000*l.* is unaccepted. Under these circumstances, and till some arrangement is made for the bills of theirs that we hold, we have thought it right to decline paying your notes, No. 148, due 11th, 300*l.*, and No. 130, due 12th, 400*l.*

“ *Sikes, Snaith* and Co.”

The bills due on the 12th and 13th were also dishonoured; and on the 14th *Sikes* and Co. stopped payment. On the failure of *Pole* and Co., the account of the Brecon bank was transferred to Messrs. *Hoare* and Co. On the 15th, *Frere* and Co. demanded the bill for 1,000*l.*, but *Sikes* and Co. declined to deliver it, and,

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without the knowledge or consent of *Frere and Co.*, procured the acceptance of it by *Hoare and Co.* An entry was also made in the books of *Sikes and Co.*, without the knowledge of *Frere and Co.*, of the discount by them of the bill for 1,000*l.*

On the 21st of December, a commission of bankrupt having issued against *Sikes and Co.*, and their assignees having declined to deliver the bill to *Frere and Co.*, a petition was presented by *Frere and Co.* to compel the delivery of the bill; and upon the hearing of that petition the Vice Chancellor (*Sir John Leach*) ordered, “that it should be referred to the Master to enquire whether at the date of the commission against *Sikes and Co.* the bill for 1000*l.* was, by the consent of the owners, in the possession, order, and disposition of the bankrupts.”

From this order the present appeal was presented.

Mr. Knight and *Mr. Montagu* for the petition:—

The law as to short bills is clearly established. This case is the same as *Zinck v. Walker*, 2 *Blacks.* 1154.

With respect to the reference to the Master, as all the facts are agreed upon, there can be no necessity for a reference: in such a case, it is for the Court, and not for the Master, to decide upon the law.

Mr. Horne and *Mr. Rose* *contrà*:—

It is settled, in a variety of cases, that discounted bills pass to the assignees. The only question is, whether these bills were discounted by the permission of the owner, and that they were so discounted is obvious, from the terms of the agreement between *Frere and Co.* and *Sikes and Co.*

Mr. Knight in reply :—

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Whether the bill was so discounted as to change the property with consent of the petitioners is the real question, and not merely whether the bill was discounted. Without enquiry as to the propriety or impropriety of discounting the bill, under the particular circumstances in which the house was placed, the actual discount of the bill cannot be severed from the permission to discount, in which the right originated; but this was a qualified permission, the terms of the agreement being, “ that the said firm of *Sikes* and Co. should be at liberty from time to time to discount such and so many only of the said trade bills, from time to time remaining in their hands, as should be necessary to meet and cover the amount of the bills, notes, and acceptances of *Frere* and Co. for the time being, in course of immediate payment.”

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Now this qualified permission does not divest the proprietor of his bill. This was the very question in *ex parte* the *Leeds* Bank, 1 *Rose*, 254. The Lord Chancellor says: “ The case of the *Leeds* Bank is distinguishable from that of the other banks in this circumstance; the *Leeds* Bank did authorize the house of *Boldero* and Co. to discount undue bills, to reduce the cash balance when they should be in advance. Unless distinguishable by this circumstance, the cases are the same: there is the same distinction between the legal power of the parties over the papers remitted, and the contracted power.”

“ The permission to discount, in this case, is limited by the purpose for which it is given, *i. e.* to reduce the cash balance; can it make any difference whether, as in

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the last case, the permission be special, and limited to an express sum, or to so much as will meet the cash advance, be it 7,000*l.* or 12,000*l.*? Can the sums being ascertained or not, make any difference, or extend the right into an absolute authority?

“ I think the *Leed*’s case is entitled to the benefit of the principles regulating my decisions in the other cases.” (a)

The LORD CHANCELLOR :—

The permission to discount was, by the terms of the agreement, limited to the purpose for which the bill was remitted; and *Sykes* and Company ought not to have received or discounted the bill without executing the trust reposed in them. It must, therefore, be delivered up to the petitioners; and as there is no dispute about the facts, the order of reference to the Master appears to me to be unnecessary, and must be reversed. (b)

Ordered accordingly.

(a) A. and Co., merchants at Liverpool, remitted a bill to B. and Co. in London, with directions to get it discounted, and apply the proceeds in a particular way. B. and Co. did not get the bill discounted, but received the money when it became due. Before that time, A. and Co. had stopped payment, and desired to have the bill returned to them. A commission of bankrupt having been issued against them before the money was received on the bill by B. and Co.: Held, that the latter were liable to be sued

for the amount by the assignees of A. and Co., as money received to their use; and that B. and Co. could not set-off a debt due to them from A. and Co. *Buchanan v. Findlay*, 9 B. & C. 738.

(b) “ If the goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them; the property of the bailor is not divested or transferred until the object is performed.” Judgment of Lord Tenterden, *Buchanan v. Findlay*, 9 B. & C. 749.

Ex parte FROWD.—In the matter of WHITE and another.

L. C.
LINC. INN,
August 10,
1829.

MR. *Frowd*, a solicitor, had been committed by the commissioners, for refusing to produce a mortgage deed of the bankrupt's property, deposited with him by his client, the mortgagee; and a writ of *habeas corpus* having been obtained (a) —

A solicitor, summoned as a witness by commissioners, under the 6 G. 4. c. 16. ss. 33, 34. to produce a mortgage deed of the bankrupt's property, refused to produce such deed, and was committed by them for not answering satisfactorily: Held, that the warrant was defective in form, and that the commitment ought to have been for not producing. All documents required to be produced should be described in the body of the summons, previously to such summons being signed by the commissioners.

The *Solicitor General* and Mr. *Montagu* now moved that he should be discharged.

With reference to the questions raised, the only material parts of the warrant were as follows:

“ Q. The commissioners having decided, upon discussion, that you are bound to produce the mortgage deed, you are required forthwith to produce it; will you do so?

“ A. No; I decline to produce it.

“ Which said answers not being satisfactory to us, the major part of the said commissioners, these are therefore, by virtue of the commission and the statute aforesaid, to will and require and authorize you, &c. to take into custody the body of the said *Edward Frowd*, &c., and him there safely to keep, &c. until such time as he shall submit himself to us the said commissioners, &c., and full answer make to our satisfaction to the questions so put to him by us as aforesaid.”

The LORD CHANCELLOR having desired to look at the original summons, observed, that there was no

(a) See *ex parte Beeton*, ante, page 244.

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be described in
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summons, pre-
viously to such
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requisition to produce the mortgage deed in the body of the summons; there was only a notice to produce it, inserted after the signatures of the commissioners, which might have been added at any time; and his Lordship said, that although the ordinary practice might be otherwise, he thought the commissioners should be careful to have the description of the documents, required to be produced, inserted in the body of the summons, previously to their signing it.

The *Solicitor General* and Mr. *Montagu* then objected, that the warrant of commitment was, upon the face of it, formally and substantially defective, as it appeared that the witness was committed for not answering to the satisfaction of the commissioners, instead of for not producing the mortgage deed, as required by the summons, and by the commissioners in their examination. The conclusion was not warranted by the premises.

Mr. *Rose* and Mr. *Macarthur* *contra*:—

The warrant would have been more correct in form had the commitment been distinctly and in terms for not producing, but, upon the authority of Lord *Eldon*'s decision in *Dale* and *Hardy*'s case, *Mont. An. Dig.* p. 185., it is not substantially bad. There the witness having refused to produce his books, or a copy to refresh his memory, so that he might be enabled to answer such questions as without reference to his books he could not answer, was committed for not answering to the satisfaction of the commissioners, and the Lord Chancellor refused to discharge him. (a)

(a) See *Dale & Hardy's Case*, note, *post*, page 271.

Here, if the witness had produced the mortgage deed, according to the summons, he might have been enabled to answer fully and satisfactorily the questions put to him.

The LORD CHANCELLOR :—

The cases are distinguishable. From the examination of *Dale*, it appears that he would have been able to answer the questions more correctly if he had referred to his books, but he refused to produce such books to refresh his memory, and was, therefore, unable to answer the questions in a satisfactory manner. This was tantamount to a refusal to answer. But here no questions were put to *Mr. Frowd* respecting the contents of the mortgage deed ; and a reference to the deed could not, therefore, have enabled him to answer more satisfactorily. I am clearly of opinion, that the conclusion of the warrant is not warranted by the premises, and that it is defective in form. *Mr. Frowd* is entitled to his discharge.

Ordered accordingly. (a)

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—
Ex parte
Frowd.
In the matter
of
White
and another.

(a) In the matter of DALE and HARDY. (b)

THE bankrupt's father was examined as follows :—

Q. Where is the stock-book made when you dissolved with *Matthew Hardy*, and why did you not bring it here, agreeably to your summons ?

A. I have brought the amount upon oath, and I say that my word upon oath is as good as any man's writing.

L. C.
Jan. 23,
1822.
If a witness
refuse to pro-
duce his books,
or a copy to
refresh his me-
mory, so that he
may be enabled
to answer such
questions as,
without refer-
ence to his
books, he cannot
answer, he may
be committed
for not answer-
ing satisfac-
torily. (c)

(b) *Montagu's Annual Digest*, *Mr. Beames' Treatise on Com-*
p. 185. *mitments in Bankruptcy*, page 40.

(c) See 1 *G. & J.* 396, and

V. C.
LINC. INN,
Aug. 11,
1829.

A creditor is not a competent witness to support a commission of bankruptcy; but where the adjudication was founded upon the evidence of a shopman, who, although a creditor, had stated, at the time of his examination, that he had no claim against the bankrupt, the Court refused to supersede the commission.

Semble, that if the objection be not taken before the commissioners, at the time of the examination, it cannot afterwards be urged as an objection to the commission.

Ex parte HILLS.—In the matter of HILLS.

THE bankrupt prayed by this petition that the commission might be superseded, on the ground that the trading, upon which the commissioners adjudicated, had been proved by a shopman, who was a creditor at the time of his examination before the commissioners. The petition was supported by affidavits of the bankrupt and of the shopman, that the latter had been an apprentice to the bankrupt; that the term of his apprenticeship had expired; that he had been then engaged as a shopman at the rate of 2*l.* 10*s.* per month; and that at the time of his examination there was due to him the sum of 17*l.* 10*s.*

Q. Why have you not brought the stock-book here?

A. I have assigned the reasons, and I persist in them.

Q. Could you not answer the questions more satisfactorily if the stock-book were now before you?

A. I refreshed my memory by looking at the stock-book.

Q. What were the amount of debts owing to *Dale* and *Hardy* at the time of the dissolution?

A. I cannot separate the stock from the debts; but the book debts and the stock together amounted to 13,000*l.* or 14,000*l.*

Q. What did *Dale* and *Hardy* owe at that time?

A. I am speaking as near as I can with respect to the stock and the book debts, which is to the amount of from 13,000*l.* to 14,000*l.* I cannot tell what debts we owed.

Q. Why did you not bring with you the books which you were required to bring, by the different summonses which you have had?

A. And would they believe my books? I have told you that my word upon oath is equal to any book which I ever had in my possession.

From the proceedings, it appeared that the witness was described in his deposition as the apprentice of the bankrupt; and it was further stated, on affidavit, by the solicitor to the commission, and his clerk, that, before the witness was sworn to the truth of the deposition, he had, in answer to questions put to him by the solicitor and the commissioners, stated, that he was not a creditor of the bankrupt, that he did not consider himself entitled to any thing, and should not make any claim.

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—
Ex parte
HILLS.

In the matter
of
HILLS.

Mr. *Rose*, for the petition, submitted, that the trading having been proved by a person who was a creditor, and therefore, an incompetent witness, the commission must be superseded.

Q. Then what amount of debts did *Dale* and *Hardy* owe at the time of the dissolution of their partnership?

A. That I have not separated; but I can tell by looking.

Q. Then what do you mean by stating, that your oath is as good as your books — that you have refreshed your memory from the stock-book, and yet have not brought it in pursuance of your summons?

A. Well, I say that it is under my care; and I will keep it for my own amusement, and hand it down to posterity.

Q. Can you answer the questions which have been asked you more satisfactorily, and particularly that in respect of the debts owing by *Dale* and *Hardy* at the time of last taking the stock of that firm; and do you wish, for the purpose of more correctly answering such questions, to be again allowed to refer to your books, and refresh your memory; and if you have time allowed for that purpose, will you do so; and will you also bring your books relating to the concern of *Dale* and *Hardy*, and particularly the stock-book made at the time of the dissolution, for the purpose of enabling you to answer more satisfactorily and correctly such questions as shall be put to you by the commissioners?

A. I can and will answer the questions more satisfactorily, and particularly that relating to the debts owing by *Dale* and

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Mr. *Horne* and Mr. *Ellison*, *contrà* :—

Ex parte
HILLS.
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It is an invariable rule with commissioners of bankrupt, to inquire of the witnesses to the trading and

Hardy, at the time of taking the last stock of that firm. I do wish to have further time allowed for the purpose of refreshing my memory ; and if I have further time allowed to refresh my memory by the books, I will do so ; but as to producing my books mentioned, or my stock-book, for the purpose of better answering, that I will never do. I will do any thing that is legal and right ; I will do any thing that the law will allow to be just.

Q. Will you then either produce the books in your possession relating to the concern of *Dale* and *Hardy*, or full copies of such books, for the purpose of refreshing your memory, so that you may be enabled to answer to the commissioners all such questions as you may not be able to answer without such books or such copies ?

A. I will not, I say I will not, until this commission is established by a higher tribunal than this.

Q. Have you any other answers to give to the questions that have been put to you, or any explanation of those answers which you have given ?

A. I cannot pretend to keep it in my memory ; but, so far as I have signed, it is all right.

Which said several answers of the said *John Dale* to the said several questions so propounded to him as aforesaid not being satisfactory to us, the said commissioners, these are therefore to will, require, and authorize you, immediately upon receipt hereof, to arrest and take into your custody the body of the said *John Dale*, and him safely convey, &c.

Mr. *Dale* was brought up by *habeas corpus* before the Lord Chancellor (Lord *Eldon*).

Mr. *Agar* and Mr. *Parker*, to support the commitment.

The Lord Chancellor refused to discharge him.

act of bankruptcy, whether they are creditors or not. In this case, the witness stated that he was not a creditor, and had no claim to make; and his evidence cannot now be received in contradiction of his former testimony. But even if it be admitted that the party was, at the time of his examination, entitled to make some claim for wages, the Court cannot now interfere to supersede the commission. In *Montagu and Gregg's Digest of the Bankrupt Laws*, page 81, it is stated, on the authority of *ex parte Lane*, (December 1806,) and the *King v. Bullock*, 1 *Taunt.* 78, that although the act of bankruptcy ought not to be proved by a creditor, if the objection is not taken before the commissioners at the first meeting, it cannot be afterwards urged, either in a civil or criminal proceeding, as an objection to the commission. In *Bullock's* case, the argument arose upon an allegation in the indictment, "that the prisoner was in due manner found and declared bankrupt." It was objected by Mr. *Holroyd*, for the prisoner, that the allegation was not supported, because the witness, on whose testimony the prisoner was declared bankrupt, was a creditor, and, therefore, not such a witness, at the time when he gave his evidence before the commissioners, as could have been received in a court of law; and that if he was not a competent witness, the prisoner was not, "upon good proof found," nor "duly declared," a bankrupt. He further urged, that the bankrupt statutes made the evidence of the creditors competent only for the purpose of dividing the property among themselves; not competent to subject any persons to a criminal jurisdiction; and that, in order to do that, the same evidence must be necessary as in all other cases. But Lord *Ellenborough*, C. J., observed: "The statute enables the commissioners to examine all persons;" and *Mansfield*, C. J., added: "It never yet was asked, on a

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trial at law, founded on a bankruptcy, upon what evidence the commissioners declared the man a bankrupt." In *ex parte Osborne*, 1 *Rose*, 387, and 2 *Ves. & B.* 177, Lord *Eldon* certainly stated, that a creditor is an incompetent witness to prove the act of bankruptcy; but in that case the commission was superseded, on the ground that no act of bankruptcy had been committed; and Lord *Eldon* never intimated, that if a creditor happened to be examined by the commissioners, he would, therefore, supersede the commission.

All objections to the competency of a witness must be taken, at first, on the *voire dire*. (a) In *Turner v. Pearte*, 1 *T. R.* 717, an objection to the competency of witnesses, discovered after a trial, was held not to be a sufficient ground of itself for granting a new trial; and Mr. Justice *Buller* said: "There has been no instance of this Court's granting a new trial, on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent. Anciently, no doubt, the rule was, that if there were any objection to the competency of the witness, he should be examined on the *voire dire*; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. (b) It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out: it has been done principally for the convenience of the Court; and it is for the furtherance of justice. The examination of a witness, to discover whether he be interested or not, is frequently to the same effect as his examination in

(a) Lord *Lovel's Case*, 9 *State* 1 *Wightwick*, 64; *Stone v. Blackburn*, 1 *Esp.* 37; *Howell v. Lock*,

(b) See *Perigal v. Nicholson*, 3 *Camp.* 14.

chief: so that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never has yet been a case in which the party has been permitted, after trial, to avail himself of any objection which was not made at the time of the examination."

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Ex parte
HILLS.
In the matter
of
HILLS.

The VICE-CHANCELLOR: —

That is where the objection was not made at the time; but here the analogy fails, because, before the commissioners, there was no person to take the objection.

For the respondents: —

The commissioners made the inquiry necessary to ascertain, whether there was any objection to the competency of the witness, and the answer satisfied them that there was not. The party examined cannot now be permitted to say that he was a creditor, and, therefore, incompetent.

Mr. *Rose* in reply: —

Supposing it to be true that the inquiry was made, and that the answer stated was given by the witness, still the bankrupt is not bound by it, because he was not present at the examination. Mr. *Christian* has, in a very learned note, expressed his doubts whether a creditor ought to be examined; and Lord *Eldon*, not only in *ex parte Osborne*, but subsequently in *ex parte Malkin*, 2 *Rose*, 27, *ex parte Harcourt*, 2 *Rose*, 203, and in many other cases, expressed his decided opinion that a creditor ought not to be examined, and that he is not a competent witness. Here the party was described as the apprentice of the bankrupt; and the commissioners knew

1829. that under the late act (6 Geo. 4. c. 16. s. 49.) an apprentice is entitled to prove in respect of his apprentice fee, which was, of itself, sufficient to have put them on their guard.

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Ex parte
 HILLS.
 In the matter
 of
 HILLS.

The VICE-CHANCELLOR: —

The authorities which have been cited shew, that a creditor is not a competent witness to support a commission of bankrupt; but no case has been mentioned, in which it has ever been held that a commission should be superseded, because a witness has been examined by the commissioners, who is discovered, subsequently to the adjudication, to have been a creditor at the time of his examination. In a solemn decision of the Judges in the case of the *King v. Bullock*, it seems that the circumstance of the commissioners having declared the bankrupt to be such, on the evidence of a creditor, was not considered a fatal objection to the commission; and it must be observed, that if Lord *Eldon* had thought differently, he would hardly have failed to intimate his opinion, on some of the numerous occasions when this case was brought under his notice. Upon the evidence now before me, it appears to be clear that the witness was asked whether he was a creditor, and replied that he was not; that he did not consider himself entitled to any thing, and did not intend to prefer any claim. I am of opinion, that after a witness has been so interrogated, and has so answered, it would afford a most dangerous precedent to supersede the commission; and that no ground, either in fact or in law, has been laid for the application.

Petition dismissed: Respondents costs out of the estate.

Ex parte BAKER.—In the matter of DANN and others.

L. C.
LINC. INN,
Aug. 11,
1829.

THIS was an application that the Lord Chancellor would rehear a petition of appeal from the Vice Chancellor, which petition had been previously heard by Lord Eldon, and the order of the Vice Chancellor reversed.

There is no settled rule of the Court to prevent the Lord Chancellor from rehearing a petition of appeal in bankruptcy.

The *Solicitor General* and Mr. *Bickersteth* objected, that it was against the ordinary practice for the Lord Chancellor to rehear a petition of appeal in bankruptcy.

Mr. *Montagu* and Mr. *Beames* for the petition :—

In *ex parte Roffey*, 19 *Ves.* 467, Lord *Eldon* expressly determined that an application to rehear his own decision might be entertained; and such has been the constant practice of the Court.

The LORD CHANCELLOR :—

These applications appear to me to be objectionable, and the practice to require regulation; but I cannot, consistently with the course recognized and pursued by my predecessors, now refuse to rehear this case.



V. C.
LINC. INN,
Aug. 12,
1829.

The petition of three creditors for an order to prove three distinct debts held to be multifarious. The Court will not permit the claims of different persons to be united in the same petition.

Ex parte SAER.—In the matter of SAER and others.

THIS was the joint petition of three creditors, praying for an order to prove three distinct debts, which had been rejected by the commissioners.

Mr. *Knight* :—The petition is multifarious. Three different cases are stated, which it may be requisite for the assignees to answer separately. Much unnecessary expense and great inconvenience would be occasioned by permitting the joinder, in one petition, of distinct causes of complaint. In *ex-parte Coles, Buck*, 256, the petition sought to expunge proofs made by various creditors, upon the different grounds of usury and gambling, and it was dismissed as multifarious.

Mr. *Rose* and Mr. *J. Russell* for the petitioners :—The case cited is the only one in which a similar objection has been entertained by the Court ; and from the particular circumstances of that case, and the fact that the petition was presented, at the instance of the bankrupt, the decision has never been considered as establishing any general rule. In principle, there seems no objection to the joinder of several creditors as petitioners.

The VICE CHANCELLOR :—

This case is the converse of *ex parte Coles* ; but the principle applies as strongly. There would be great practical inconvenience in uniting many claims in one petition. Let the petition be dismissed with costs as to two of the debts, and stand over until the next day of

petitions as to the other debt, that the assignees may have an opportunity of answering the petition as to that debt.

Ordered accordingly.

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Ex parte
SARR.
In the matter
of
SARR
and others.

Ex parte CROWE.—In the matter of WHARTON.

THE petition prayed that the Court would order the personal representative of a deceased assignee, to account for the personal estate of the bankrupt in his hands.

Mr. *Loraine* for the petition.

Mr. *Treslove* *contra* :—The Court has no jurisdiction, *ex parte Wackerbath*, 2 G. & J. 151. What is asked by this petition cannot be effected without a general account of all the assets of the deceased assignee, and such an account cannot be taken in bankruptcy.

V. C.
LINC. INN,
Aug. 12,
1829.

The Court, sitting in bankruptcy, has no jurisdiction to direct that the personal representative of a deceased assignee shall account for the personal estate of the bankrupt in his hands.

Mr. *Loraine* :—In *ex parte Lane*, 1 Atk. 90., Lord *Hardwicke* appears to have made such an order.

The VICE CHANCELLOR :—

I am of opinion that I have no jurisdiction, sitting in bankruptcy, to make the order which is now asked for. The case cited from *Atkins* is too vague to be acted upon by the Court.

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Ex parte
CROWE.

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of
WHARTON.

A note of a judgment of Lord *Eldon's* on this subject has been communicated to me from the bankrupt office. It was written on a petition in the matter of *Abbey*, and bears date February 8th, 1826. It is as follows: "In this case, as I understand it, upon reading it again, the assignee of a bankrupt dies, and the property which, in the course of that bankruptcy, had been assigned to him, was invested, as the papers represent, in the name of one of the present bankrupts, as personal representative of such deceased assignee, viz. in the bankrupt now sought to be committed for not executing an assignment of that property to new assignees. But upon considering this matter, I wish the secretary of bankrupts to see if he can find any instance of an assignee's personal representative being compelled by order, upon a petition in bankruptcy, to assign the estate which he has in the character of personal representative of a deceased assignee. In this case an order is made upon all necessary parties; but is that done in practice, where necessary parties have no demands against the estate? or are not, in practice, bills thought necessary in such cases? It is true, that in this case the personal representative is a bankrupt; but under a commission of this date, could any bankrupt be compelled to execute an assignment? and if not, would his becoming a personal representative impose an obligation on him to be enforced by petition to do so?" It appears that the order was ultimately refused by Lord *Eldon*.

Mr. *Loraine* inquired if Mr. *Treslove* would admit assets, and submitted that in that case the order might be made.

Mr. *Treslove* declined to admit assets.

The VICE CHANCELLOR : —

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I think the admission would make no difference ; and that, even with such an admission, the order could not be made. (a)

Ex parte
CROWE.
In the matter
of
WHARTON.

Petition dismissed with costs.

Ex parte POWELL.—In the matter of PRODGERS.

V. C.
LINC. INN,
August 13,
1829.

IN the month of December 1824, a commission was issued against *E. Prodgers* ; and, on the 25th of Dec. 1825, a dividend of 6s. in the pound was declared, and was advertised to be paid to the creditors (who exceeded two thousand in number) on different days, from the 13th of February to the 4th of March 1826. The payments were made by checks, drawn by the assignees upon the firm of *Coleman and Wellings*, the bankers duly appointed under the commission. On the 4th of March, the assignees having ascertained that many of the creditors had neglected to apply, extended the days of payment to the 18th of the same month ; and in pursuance of a further notice, requesting the attendance of all creditors who had not received their dividends, the assignees met again, for the purpose of making payments, on the 20th, 21st, and 22d days of March. At the expiration of this time, there remained in the hands of

considered as a separation, from the bulk of the estate, of the sum to be divided, and that the unpaid dividends were lying in the hands of the bankers, at the risk of the creditors who had neglected to apply for payment.

Under a commission against A. a dividend was declared, and repeatedly advertised to be paid to the creditors who had proved. Subsequently to the appointed days for payment, B. and C., the bankers to the commission, in whose hands a sum, more than sufficient for the payment of such dividend, had been left by the assignees, stopped payment, and afterwards became bankrupt : Held, that an order of dividend is to be

(a) See *Saxton v. Davis*, 1 *Rose*, 79 ; 18 *Ves.* 72.

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Ex parte
POWELL.
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of
PRODGER.

the bankers, *Coleman and Wellings*, the sum of 4,096*l.* applicable to the payment of the dividends of creditors who had still neglected to apply.

On the 29th of March 1826, a commission of bankrupt was issued against *Coleman and Wellings*. Under this commission, the assignees of *Prodgers* proved against the estate of *Coleman and Wellings*, the sum of 8,185*l.* 6*s.* 11*d.*, which included the above sum of 4,096*l.*; and in respect of this latter sum, they subsequently received from the estate of *Coleman and Wellings*, a dividend of 4*s.* in the pound, amounting to 819*l.* 14*s.* Under these circumstances, the assignees of *Prodgers* contended, that the creditors who had neglected to apply for the dividend of 6*s.* in the pound, declared on the 24th of December 1825, were only entitled, between them, to the said sum of 819*l.* 4*s.*; whilst, on the other hand, these creditors insisted that they were entitled to be paid, out of the general estate of *Prodgers*, the full amount of the dividend of 6*s.* in the pound.

The present petition was presented by the assignees, in order to obtain the opinion of the Court upon these claims.

Mr. *Rose* and Mr. *Montagu* for the assignees: —

When the commissioners, at a dividend meeting, have ascertained how much in the pound is to be paid to every creditor under the commission, an order of dividend is made, which order amounts to a specific appropriation, for the benefit of each creditor, of the aliquot part to which he is entitled. The creditor has then a right to present a petition, in the nature of an action for money had and received, for the share ordered to be

paid to him. *Ex parte Wackerbath*, 2 G. & J. 151; *ex parte Grant*, *ante*, page 77. Under the 6 Geo. 4. c. 16. s. 102. the creditors have authority to select the banker to the commission. It is clear, therefore, according to principle and on authority, that after the order of dividend, and certainly from the time when the dividend was in the course of payment, the money, applicable to the payment of such dividend, was lying in the hands of *Coleman* and *Wellings*, at the risk of the creditors entitled to receive it. Independently of this, their neglect would be alone sufficient to fix them with the loss sustained.

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Ex parte
POWELL.
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PRODGER.

Mr. *Horne* and Mr. *Spurrier contra* :—

The bankers, *Coleman* and *Wellings*, would not have paid the creditors, except by order of the assignees. They knew nothing of the creditors individually; they dealt only with the assignees, in their character of assignees, representing the general body, and the interests of the general estate. In that character they proved against the estate of *Coleman* and *Wellings*, and they have treated the sum of 4,096*l.* so as to shew that they considered it part of the general estate. It was in fact never separated from the bulk of the estate; there never was any appropriation of a specific sum to pay the dividend of 6*s.* in the pound. As the individual creditors, therefore, could not have claimed their respective shares of the sum of 4,096*l.* from *Coleman* and *Wellings*, it is unreasonable to say that there was a specific appropriation of that sum for their use, and that it was lying in the banker's hands at their risk.

Mr. *Rose*.—It will not be forgotten, that the bankrupt's allowance and his right to any surplus would be

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affected by the payment of these creditors out of the general estate, and this affords an additional objection to their claims.

The VICE-CHANCELLOR : —

The question is between the general body of creditors, and those who neglected to receive their dividends, when they were in the course of payment. It may be true that the latter could not have brought actions against the bankers for their respective shares, but still they had a specific right to the property, and had a direct remedy against the assignees. Lord *Eldon's* language, in *ex parte Wackerbath*, warrants a conclusion, that he considered an order of dividend as a separation, from the bulk of the estate of the sum to be divided. I think that the sum of 4,096*l.* was lying in the hands of *Coleman* and *Wellings*, at the risk of the creditors entitled to divide it between them, and that they can now only claim the amount of dividend which the assignees have received from the estate of *Coleman* and *Wellings*, in respect of that sum.

Ordered accordingly : Costs of all parties out of the estate.



Ex parte SURRIDGE.—In the matter of JOYNER.

V. C.
LINC. INN,
August 13,
1829.

ON this petition, the question whether a bankrupt was entitled to claim his allowance before a final dividend had been made, was again submitted to the Court.

The bankrupt is not entitled to claim his allowance until after a final dividend has been made.

The VICE CHANCELLOR, after referring to the case of *ex parte* Davis, *ante*, page 36., and what he had subsequently stated in *ex parte* Minchin, *ante*, page 141., decided, that, according to the authorities, and what appeared to be the uniform practice of the Court, the bankrupt could not claim any allowance until after a final dividend had been made, because before that time, and so long as other creditors were at liberty to prove, it would be impossible to ascertain correctly to what allowance the bankrupt was entitled.

Mr. Swanston for the petition.

Mr. Bickersteth and Mr. Jacob *contrâ*.

Ex parte BATTEN.—In the matter of HAM.

V. C.
LINC. INN,
August 13,
1829.

THIS was a petition to supersede a commission issued after the 1st of September 1825, on the ground that no trading subsequently to that time had been proved.

A commission issued under the 6 Geo. 4. c. 16. ordered to be superseded, on the ground that there was no proof of any trading subsequently to the

Mr. Whitmarsh for the petition :—

The bankrupt act of the 6 Geo. 4. c. 16., which repealed all former acts, came into operation on the 1st of

1st of Sept. 1825, when the 6 Geo. 4. c. 16. came into operation.

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Ex parte
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September 1825. In *Maggs v. Hunt*, 4 Bing. 212., the Court of Common Pleas decided that a commission issued after the 1st of September 1825 could not be supported upon an act of bankruptcy committed in the month of July preceding (a); and in a recent case, the Court of King's Bench determined that a commission issued since the 1st of September 1825 could not be supported by evidence of a trading previously to that time. (b)

Mr. *Ellison* *contra*.

The VICE CHANCELLOR: —

Lord *Tenterden* has expressed a very strong opinion that proof of trading, since the new act came into operation, is essential. The words of the statute are too strong to admit of any other construction. Whatever may be the inconvenience, therefore, I am bound to direct a supersedeas.

Ordered accordingly.

(a) The same point was decided by the Court of King's Bench, in the cases of *Hewson v. Heard*, and *Palmer v. Moore*, 9 B. & C. 754.

(b) *Surtess v. Ellison*, 9 B. & C. 750. In giving judgment, Lord *Tenterden* said: "We are to look at the statute 6 G. 4. c. 16. as if it were the first that had ever been passed on the subject of bankruptcy; and so considering it, we cannot possibly say that there was any sufficient trading to sup-

port the commission. It is certainly very unfortunate, that a statute of so much importance should have been framed with so little attention to the consequence of some of its provisions. It is said, that the last will of a party is to be favourably construed, because the testator is *inops consilii*. That we cannot say of the legislature; but we may say that it is '*magnas inter opes inops*.' "

Ex parte GRANGER and another.—In the matter of
CHAMBERS.

V. C.
LINC. INN,
August 14,
1829.

THIS was the petition of two creditors, praying that a copy of the assignees' accounts might be prepared and delivered to them at their own expence.

Creditors are not entitled to apply to the Court for an order, to have copies of the assignees accounts delivered to them. They are entitled under the 6 Geo. 4. c. 16. s. 101. to inspect such accounts, and for that purpose an application must be made, in the first instance, to the commissioners.

Mr. Knight and Mr. Swanston for the petition.

Mr. Rose, *contra*, objected that such an application was unprecedented ; and that from the terms of the 6 Geo. 4. c. 16. s. 101. it was clear the petitioners should have first applied to the commissioners, who were expressly authorized to summon the assignees before them, and to require the production of all books, papers, and documents relating to the bankruptcy.

Mr. Knight.—There is no precedent to shew that creditors are not entitled to come directly to the Court, when they offer to protect the estate from any expence that may result from their application.

The VICE CHANCELLOR :—

I think the course proper to be pursued is sufficiently pointed out by the 101st section of the bankrupt act. It is there declared that the accounts directed to be kept by the assignees may be inspected by every creditor, at all seasonable times ; and a power is given to the commissioners to summon the assignees before them, and to require the production of all books, papers, and documents relating to the bankruptcy. If the parties now before the Court were denied their right of inspection, an application should have been made by them to

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of
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the commissioners, who would have afforded them, no doubt, according to the ordinary practice, an opportunity of seeing the accounts. But instead of adopting this course, they come here, in the first instance, and apply for copies of the assignees' accounts. Much inconvenience might arise from entertaining such a petition.

Petition dismissed with costs. (a)



L. C.

LINC. INN,
Nov. 2,
1829.

In the matter of STAMMERS.

Where, after the opening of the commission, the name of the bankrupt had been erroneously altered by the clerk of the solicitor, the Lord Chancellor refused to allow the commission to be amended, and directed that it should be superseded.

A COMMISSION issued against the bankrupt under the name of *Stammers*. After the commission had been opened, the clerk of the solicitor, supposing that the name was *Stammer*, erased the final *s*. This was done innocently and without the knowledge of the solicitor, who petitioned that the *s* might be restored, or that the commission might be superseded.

Mr. *Montagu* for the petition :—

The LORD CHANCELLOR intimated, that he was unwilling to order any commission to be amended after it had been opened, and directed that this commission should be superseded.

(a) In *ex parte Brocksopp*, erroneous, the Vice-Chancellor *Buck*, 304, where, after the assignees' accounts had been admitted by the commissioners, it was discovered that such accounts were decided that the creditors should have applied to the commissioners before they presented a petition.

Ex parte WAKEFIELD and others.—In the matter
of J. & W. NEVILLE.

L. C.
West. Hall,
Nov. 11.
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ON the 27th of October, an affirmation of debt was made, and the usual bond executed, by *Edward William Wakefield*, on behalf of himself and his three partners, as petitioning creditors; and on the 28th these docket papers were lodged at the bankrupt office. On the 30th of October, *John Wakefield* the elder, one of the petitioning creditors, died. Between the 28th of October and the 2d of November, the usual petition for a commission was filled up at the bankrupt office, and preferred to the Lord Chancellor. On the 2d of November, the Lord Chancellor signed a *fiat* at the foot of the petition; and the commission was then sealed, with the petition and *fiat* annexed.

A commission having issued on the petition of four partners, one of whom died before the date of the *fiat* and of the commission, it was ordered to be superseded forthwith, with liberty to the surviving partners to lodge new docket papers and issue another commission.

The commissioners having, after the opening of the commission, intimated an opinion that the commission was irregular, as having issued on the petition of four partners, one of whom died before the date of the *fiat* and of the commission.

Mr. *Macarthur* now applied, that the petition, and the commission grounded thereon, might be amended, by striking out the name of *John Wakefield* the elder, as a petitioning creditor; or that the commission might be superseded forthwith, with liberty to the surviving partners to lodge new docket papers, and issue another commission.

The LORD CHANCELLOR said, that as the commission had been opened, the latter appeared to him the safer

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and more regular course, and directed an order to be made accordingly. (a)

Ex parte
WAKEFIELD
and others.
In the matter
of
J.&W.NEVILL.

(a) The Editors have been favoured with the following note from the bankrupt office:

V. C.
March
1823.

Ex parte TANNER and another.—In the matter of
PARKER.

Where a petitioning creditor died after the issuing of the commission, and before adjudication, it was ordered that the commissioners should be at liberty to adjudicate upon the deposition, of his executors.

ON the 8th of January 1823, a commission issued on the petition of *Edward Winwood*.

On the 16th of February, and before the opening of the commission, *Winwood* died. On the 27th, his will was proved by his executors, the petitioners; and on the 28th, one of them attended before the commissioners, to prove that 100*l.* and upwards was due to *Winwood* before the date and suing forth of the commission. But some doubt having been expressed as to whether this was a sufficient compliance with Lord Rosslyn's order of the 26th of November 1798, this petition was presented, and the Vice-Chancellor (Sir *John Leach*) ordered that the commissioners should be at liberty to declare the bankruptcy, upon the deposition and examination of the petitioners, or one of them, as to the nature and amount of the debt, &c.

Ex parte GRUNDY.—In the matter of RUSSELL.

THIS was an appeal from the judgment of the Vice-Chancellor. By an indenture bearing date the 18th day of February 1772, and made on the marriage of *George Russell* (the bankrupt) and *Sarah* his wife, the said *George Russell* covenanted, in consideration of the then intended marriage and of 2,000*l.* (the amount of his wife's portion), that in case his wife or any issue of the marriage should survive him, he the said *George Russell*, his executors or administrators, should immediately upon his decease pay to the trustees the sum of 2,000*l.*, amongst other trusts, upon trust that, in case there should be any child or issue of the marriage living at the time of the death of the survivor of the said *George Russell* and *Sarah* his wife, the trustees should pay the said sum of 2,000*l.* to and amongst such children equally, and that each part or share should become vested and payable at twenty-one, or marriage. Mr. *Russell* also executed a bond, of the same date, in the penal sum of 4,000*l.*, for the performance of the covenants contained in the marriage settlement. On the 14th July 1803 a commission of bankrupt issued against Mr. *Russell*, under which he obtained his certificate; and on the 21st of February 1825 he died, having survived his wife, and leaving three children, who became on his death entitled to the above mentioned sum of 2,000*l.* Dividends, to the amount of 12*s.* in the pound, had been paid under the original commission; and a further and final dividend had been lately advertised under a renewed commission, which issued on the 3d of May 1828. It being found that the trustees of the marriage settlement were dead, and that one trustee having died abroad, it was uncertain which was the survivor, the

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LINC. INN,
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In Feb. 1772, A. covenanted by his marriage settlement for the payment of 2,000*l.*, in case his intended wife, or any issue of the marriage, should survive him.

In 1803, a commission of bankrupt issued against A., under which he obtained his certificate. In Feb. 1825, A. died, leaving issue of the marriage. In May 1828, there being funds remaining for distribution amongst the creditors of A., a renewed commission was issued, and a final dividend advertised:

Held, that the 6 Geo. 4. c. 16. s. 56. is retrospective in its operation; and that, although the event upon which the debt was contingent had happened after the commission issued, and before the 6 Geo. 4. c. 16. came into operation, the sum of 2,000*l.* was proveable as a debt under the commission.

1829. petition prayed that the petitioner (the husband of one
 ————— of the children), or some other person, might be at liberty
Ex parte to prove the sum of 2,000*l.* under the renewed commis-
 GRUNDY. sion, and to receive a dividend with the other creditors in
 In the matter respect thereof, not disturbing any former dividend.
 of
 RUSSELL.

V. C. On the 15th of November, the petition was brought
 Nov. 15, on for hearing before the Vice-Chancellor, as unopposed,
 1828. under an impression that the only difficulty was in ad-
 mitting the cestuique trusts to prove in the absence of
 the trustees.

But Mr. *J. Russell*, on behalf of the assignees, ob-
 jected that the debt, being contingent on an event which
 had not happened at the time of the bankruptcy, in 1803,
 was not proveable according to the law as it existed
 before the passing of the 6 Geo. 4. c. 16., and that the
 56th section of that act had no retrospective effect upon
 commissions which had previously issued. In support
 of this objection, he relied on the 135th section of the
 6 Geo. 4. c. 16., which regulates the construction of the
 act, and declares that nothing therein contained "shall
 effect or lessen any right, claim, demand, or remedy
 which any person now has" under any subsisting com-
 mission, "or upon or against any bankrupt against
 whom any commission has or shall have issued, except
 as herein is specifically enacted."

Mr. *Merivale*, for the petition, submitted, that it had
 been already determined that some of the clauses of the
 statute have a retrospective effect; and particularly that
 in the case of *Bell v. Bilton*, 4 Bing. 615, it was recently
 decided by *Best*, C. J., that the 55th section was opera-
 tive, although the annuity was granted, and the grantor
 had become bankrupt, previously to the 1st of Sep-

tember 1825, when the 6 Geo. 4. c. 16. came into operation.

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The VICE-CHANCELLOR, however, thought that he was not bound, by analogy to this decision, to give a similar construction to any other clause of the statute, and being of opinion that the 56th section of the 6 Geo. 4. c. 16. could not be held to relate to commissions which existed previously to the passing of that act, without infringing upon the words of the 135th section, he dismissed the petition.

Against this decision the present appeal was presented.

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Mr. *Montagu* and Mr. *Merivale* for the petition : —

This case is of importance, not only to the parties but to the administration of justice, that there may not be, either in reality, or in appearance, a conflict between the decisions in this court, and in the courts of common law, where the question has been in substance decided.

The bankrupt act (6 Geo. 4. c. 16.) has a retrospective operation : first, when it re-enacts the old law, and secondly, when there is a specific enactment of new law.

That it has a retrospective operation, when it re-enacts old law, is expressly declared by the words of the 135th section “that nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared.” It has, therefore, in general, a retrospective operation when it re-enacts old law, as we daily see by the decisions upon questions, arising under commissions that were in existence before the present act passed ; as in questions of commitments, of dividend,

1829. of certificate, of proof of debts, and of all the various subjects which, without any new enactment, are, in practice, of constant occurrence.

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The retrospective operation of the new act is not confined to the re-enactment of old law. It extends to the specific enactment of new law ; because, first, it is declared by the 135th section, that, in the cases of specific enactment, it shall have a retrospective operation : and, secondly, because the legislature has expressly declared in what cases the law shall operate only on future commissions. By the 135th section it is declared : " that nothing herein contained shall affect or lessen any right, claim, demand, or remedy, which any person now has thereunder," (that is, under any subsisting commission,) " except as is herein specifically enacted." From these words, it is obvious that specific enactments have a retrospective operation. But this retrospective operation, in cases of specific enactments, in general, is further confirmed by the legislature having defined what new enactments shall be only prospective to future commissions, as in the 57th section, where the clause thus begins : " And be it enacted, that in ALL FUTURE commissions," &c. ; and, in the 96th section, where the words are : " And be it enacted, that in all commissions issued *after* this act shall have taken effect," &c. This is noticed in the case of *Bell v. Bilton*, 4 Bing. 618, by *Best*, C. J., who says : " Where the legislature intended that the statute should not affect commissions previously issued, that intention is declared in express terms : such terms will be found in the 57th, 96th, and 98th sections. The introduction of such words into those sections furnishes a strong argument to prove that the other sections, containing words capable of bearing a retrospective construction, should receive that construction."

There have been several decisions that tend to confirm this view of the manner in which the statute ought to be interpreted. The first was *ex parte Ruck*, heard before Lord Eldon in March 1826, where his Lordship determined that the amount of a bankrupt's allowance, under an old commission, was to be regulated by the time when the right to it vested, and that the right having, in the case before him, vested before the present act came into operation, the bankrupt was only entitled to the smaller sum, payable under the 5 Geo. 2. c. 30. s. 7. But from this decision it appears to have been Lord Eldon's opinion, that in cases where the bankrupt's right to an allowance vested after the 1st of September 1825, although under a commission previously issued, the amount of such allowance would be regulated by 6 Geo. 4. c. 16. s. 128. (a) On the same principle, in *ex parte*

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(a) *Ex parte RUCK*. — In the matter of GILLBEE.

THE petition stated, that on the 11th of July 1816 a commission of bankrupt issued against *Nicholas Gillbee*, under which he was duly declared a bankrupt, and that the petitioners, together with *Joshua Lomas*, since deceased, were chosen assignees; that the bankrupt surrendered to the commission, and obtained his certificate; that two dividends, amounting together to 15*s.* in the pound, had been paid; that is to say, a dividend of 10*s.* in the pound on the 24th of February 1818, and a dividend of 5*s.* in the pound on the 14th of April 1821; that the bankrupt died in the month of December 1822; that in the month of March 1825 a final dividend was advertised in the London Gazette of the 15th of March 1825, to be made on the 7th day of May following, for which purpose a meeting took place; but, in consequence of some claim being made against the bankrupt's estate which required investigation, the declaration of a final dividend was adjourned by the commissioners, at the request of the assignees, until the 12th day of July 1825; that on the 10th of July,

L. C.
March 1,
1826.

Where the bankrupt's right to an allowance, vested before the 1st of September 1825: Held, that he was only entitled to the amount directed to be paid by the 5 G. 2. c. 30. s. 7.

1829. *Davis, ante*, 36, where the commission issued in October 1815, and a final dividend was advertised in June 1827,

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Joshua Lomas, one of the assignees, died; and, in consequence, the petitioner, *Henry Layton Lomas*, who was his son, and also one of the assignees, was necessarily absent from the said meeting on the 12th of July, and thereupon the commissioners further adjourned the order for a final dividend until the 11th day of October 1825; that the second adjourned meeting took place on the 11th day of October, when the above-mentioned claims against the bankrupt's estate were settled, and the accounts of the petitioners, as surviving assignees, finally audited and allowed; but that a dividend was not actually declared, a question having been raised at the meeting as to the amount of the bankrupt's allowance, it being insisted, on the part of two claimants, one the administrator of the deceased bankrupt, and the other an assignee, by way of mortgage of the said allowance, that such allowance ought to be regulated by the provisions of the 6th Geo. 4. c. 16., which act came into operation on the 1st day of September 1825, and by which the allowance of bankrupt's paying 15s. in the pound was increased from 300*l.* to 600*l.*; and, on the part of the petitioners, the assignees, that the representatives of the bankrupt were only entitled to the sum of 300*l.*, because this was an old commission, which had been fully prosecuted, and the final dividend actually advertised before the 6th Geo. 4. c. 16. passed into a law; and which final dividend, except from the circumstances above mentioned, would have been declared before the new statute came into operation.

The commissioners having decided that the estate should be administered according to the provisions of the 6th Geo. 4. c. 16., and that the amount of the allowance should be six hundred pounds,—the petition prayed that it might be declared that the bankrupt's estate was entitled to be paid the sum of 300*l.* only, in respect of the said allowance.

Mr. Rose, for the petition.

Mr. Montagu, contra, for the representatives of the bankrupt.

the Vice-Chancellor ordered the larger allowance according to the provisions of the late Act. So also in *ex parte Minchin*, ante, 135, where the commission issued long previously to the late act, the larger allowance was directed to be paid. In *ex parte Saunders*, 2 G. & J. 132, the Vice-Chancellor (Sir John Leach) directed a reference to the Master, according to the 6th Geo. 4. c. 16. s. 79., to approve of a new trustee, and for the transfer of the trust funds by the assignees of a bankrupt, under a commission issued in June 1824.

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The LORD CHANCELLOR postponed his judgment, and on the 6th of September 1826 directed the following order to be drawn up.—“ It appearing by the said petition, and the affidavit filed in support thereof, that the net produce of the estate and effects of the said bankrupt *Nicholas Gillbee*, recovered in and received by the said assignees, (after providing for the statutable allowance of the said bankrupt,) was sufficient to pay the creditors of the said bankrupt, who had proved their debts under the said commission, the sum of 10s. or more in the pound, on the amount of their respective debts, *before the 1st day of September 1825*, the day on which the act passed in the 6th year of the reign of his present Majesty, intituled, ‘ An act to amend an act relating to bankrupts,’ *came into operation*. I do declare, that the said bankrupt became entitled to his allowance at and after the rate declared in that respect by the act of Parliament passed in the 5th year of the reign of his Majesty King *George the Second*, intituled, ‘ An act to prevent the committing of frauds by bankrupts.’ And I do further declare, that when such dividend or dividends of 10s. or more in the pound was declared by the said commissioners, the said bankrupt, or his legal personal representative, if the said bankrupt was then dead, became entitled to such allowance. And I do therefore order, that such allowance as would have been coming to the said bankrupt, if he had been living, be paid by the assignees to the party legally entitled to receive the same.

(Signed) “ ELDON, C.”

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The case of *Bell v. Bilton*, 4 Bing. 618, has been already mentioned. The Court of Common Pleas there decided, that although the annuity was granted, and the grantor had become bankrupt previously to September 1825, still the grantee was bound, by the provisions of the 6th Geo. 4. c. 16. s. 54. and 55., to have the value of the annuity ascertained before the commissioners, and to prove for the amount under the commission before he sued the surety of the grantor in respect of the arrears of the annuity. The 55th section was therefore held to be a specific enactment, and to have a retrospective operation. In *Churchill v. Crease*, 5 Bing. 178, the 82d section of the act was also held to be retrospective, and the Court determined that a payment made in June 1825 by a debtor, *bonâ fide* and without intention of fraudulent preference, eight days before a commission of bankrupt issued against him, was protected under this clause. (a). The Vice-Chancellor's decision in *ex parte Robinson*, ante, 44, where the bankruptcy occurred previously to September 1825, must have been likewise founded on the retrospective operation of the 127th section. Lord *Tenterden* also appears to have intimated the same opinion in his judgment in *Till v. Wilson*, 7 B. & C. 690. And, lastly, if a reference be permitted to the opinions of the framer of the late bankrupt act, who must, in many respects, be considered as the best commentator on the intentions of the legislature, all doubt as to the intended effect of the 56th section would be removed. (b)

The great objects of the bankrupt laws are to give to every creditor a share of the estate; and to exonerate

(a) See also *Terrington v. Hargreaves*, 5 Bing. 489; *Biggs v. Fellows*, 8 B. & C. 402. (b) See *Eden's B. L.* page 135, &c.

the bankrupt from demands which, when divested of all property, he has no means of satisfying. In *Bell v. Bilton* the Chief Justice says: — “ In the first place, the object of the legislature was completely to relieve bankrupts from all future demands on account of annuities granted by them. To do this, the act must be made to embrace such as were granted before, as well as those granted since it was passed.” (a)

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The hardship attendant both upon creditors and bankrupts from demands not being proveable, because they did not fall within the technical definition of the term “ Debt,” was always particularly felt in the cases of contingent debts and annuities. This hardship appeared to different Chancellors to be so severe, that in the case of contingent debts, the Court was in the habit, formerly, of recommending assignees to make some allowance to the creditors. In *ex-parte Caswell*, (1728,) 2 P. Wms. 497, which case arose upon the bond of a husband to the wife’s trustees, payable in the event of his wife’s surviving him, Lord *Hardwicke* said, “ Though the debt were contingent when the obligor became a bankrupt, yet if the contingency happened before the distribution made, then such contingent creditor, should come in for his debt ; so, if such contingency happened before the second dividend made, the creditor should come in for his proportion thereof, though after the first dividend.” In *ex-parte Greenaway*, 1 Atk. 113, where, in a similar case, the husband actually died before the distribution made, the wife prayed to have a dividend. Lord *Hardwicke* expressed his opinion of the hardship of the case, and intimated some doubt as to the law. The matter was however compromised. Then followed

(a) 4 Bing. 618.

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the cases of *ex-parte Groome*, 1 *Atk.* 115; and *ex parte Michell*, 1 *Atk.* 120; where Lord *Hardwicke*, in consequence of the apparent hardship, recommended the assignees to compromise with the wife. The same disposition was expressed by the Court in *Holland v. Calliford*, 2 *Vern.* 662. What reason then is there for supposing that in the cases of contingent debts and annuities the law ought not to have a retrospective operation, and for concluding that what different Chancellors and Judges have thought ought to be done, the Legislature did not intend to enact?

The clauses respecting the proving of debts are from the 51st to the 58th sections inclusive, all of which have a retrospective operation, except the 57th section, which is limited in direct terms to "all future commissions," and which exception strongly indicates that the other clauses were intended to have a more extensive effect. The 51st section is a re-enactment of old law; but the 52d section, besides re-enacting old law, specifically declares that bail shall be sureties within the meaning of the provision by which sureties are entitled to prove; thus altering what had been determined to be the law in *Hawes v. Mott*, 2 *Mar.* 93. In this clause there is nothing to limit its operation to future commissions.

The 54th section introduces a new enactment as to the mode of valuing annuities, without restricting it to future commissions; and we have seen that the Court of Common Pleas has decided that both this and the following clause are retrospective. Upon this part of the act, *Best*, C. J. says:—"I confess that I have had considerable difficulty in making up my mind, whether the legislature could mean to affect annuities granted before the passing the late act; but although

I cannot satisfy myself that the principle of the act is just, I think, on reflection, that the legislature did intend that the clauses should apply to annuities granted before the passing the 6 Geo. 4.; and, being satisfied of that, we are bound to give it this effect, whatever may be the consequence." (a) On this it must be remarked, that whether it is or is not just that a creditor should be compelled to prove his debt against the principal, by which his security may be weakened, instead of enabling the surety to prove it, is a question for the consideration of the legislature, and not for either this Court or a court of law to determine. The question before the Court was simply whether the 54th and 55th sections had a retrospective operation, and it was decided that they had.

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The next clause is the 56th, respecting contingent debts, under which the present question arises; and it will not escape observation, that this section is not restricted to future commissions, although the 57th section, which immediately follows, is so limited by express words. "And be it enacted, that *in all future commissions* against any person or persons," &c. Besides, if it had been intended by the Legislature to prevent the statute from having a retrospective operation, nothing would have been more easy than to have declared that the act should not be construed so as to have any effect whatever upon the rights of parties under existing commissions; but from the acknowledged evils attendant upon the old law, and the opinions frequently expressed by the most eminent persons, there seem to be satisfactory reasons for concluding that it was expressly intended by the legislature to put an end,

(a) 4 Bing. 618.

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To distinguish in legislation what belongs to the past from what concerns the future, is frequently, no doubt, attended with difficulty. A contract, legal at the time of its being entered into, ought not to be invalidated by subsequent prohibition; nor should a man be put upon his trial for an offence which was not cognizable by law when the act was committed. But this principle does not extend to all the possible consequences that may result from a contract so entered into, or an act so committed. A law that is retrospective is not necessarily *ex post facto*. Suppose a statute makes some particular act illegal that was not so before, and that a party has been previously gaining his livelihood by acts of the nature now prohibited, it is evident that every arrangement made, and every contract entered into, with reference to the act so prohibited, must be annulled, and a retrospective effect thus given to the new law; yet this, so long as the party is not made criminally answerable under the new law, for acts done previously to its enactment, is unobjectionable in principle. (a)

In this case it is not pretended that the 56th section establishes any new right. The debt was already subsisting, and in itself an obligation of the highest order; but by an admitted defect of law, it could not be made available in a certain event which has happened. The petitioners submit, that the new clause removes the impediment. They claim a right, not to any particular sum of money,

(a) "Esprit, Origine, et Progrès des Institutions Judiciaires, par J. D. Meyer," tom. v. chap. 4. Sect. 6. "De retrospectione legum." See also Lord Bacon's Tract: "De Justitia Universali."

but to come in and share rateably with all the creditors. What right would be displaced by the relief they ask? The right of each creditor is not a right to receive, by way of dividend, a specific and fixed sum, but a right to share rateably with all other creditors under the commission. It is a fallacy to contend that, according to the true meaning of the 135th section, the admission of an additional creditor to prove, *affects* or *lessens* "the right" of any creditor who has previously proved, because that right is only a right to share rateably with others. If it were contended that any creditor was to be excluded from so sharing, there would be a reason for applying the terms of the clause for his protection. It is not denied also that dividends actually received ought to be protected, and for this, it will be observed, that the statute has expressly provided.

Mr. J. Russell.—Without entering into speculations as to the hardship which resulted from the old law with respect to contingent debts, or examining the frequently expressed opinions of eminent persons as to the propriety of introducing some alteration, it will be almost sufficient for me to submit to the Court, that the natural and obvious meaning of the clause is prospective. The words are: "And be it enacted, that if any bankrupt shall, before the issuing of the commission, have contracted any debt, payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon." The point which appears to be contemplated is the issuing of the commis-

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sion; and in this case it will not be forgotten, that not only had the commission issued, but that the contingency had actually ceased before the new bankrupt act came into operation, which brings the case within the principle on which Lord *Eldon* seems to have proceeded in *ex parte Ruck*. (a) To give the statute a retrospective operation, under such circumstances, would be to alter the law even further than appears to have been contemplated by Lord *Hardwicke*. His expressions were, that he wished "some gentleman would think of a clause which might remedy and settle this *for the future*." (b) It may indeed have been the intention of the framer of the new bankrupt act that the clause should relate to the past as well as the future, but his opinions cannot be received as a certain or legitimate authority to guide the Court to the meaning of the legislature. The learned persons who took part in the preparation of the new statute, never could have intended to prevent a commission from being supported on an act of bankruptcy committed previously to September 1825; but we know that such has been the construction put upon the 6 Geo. 4. c. 16. by the Court of Common Pleas, in *Maggs v. Hunt*, 4 Bing. 212, and that this decision has been confirmed, in a subsequent case, by the Court of King's Bench.

With respect to the case of *Bell v. Bilton*, 4 Bing. 615., which has been so much relied upon on the other side, it is most important to observe, that although the Court of Common Pleas certainly held that the 55th section has a retrospective operation, that decision did not make any new debt proveable under the commission. The value of the annuity was proveable previously to the

(a) *Ante*, page 297.

(b) 1 *Atk.* 120; 9 *Ves.* 110

passing of the present bankrupt act; and no question, therefore, fairly arose as to the effect of the proviso in the 135th section.

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In a cause of *Watkins v. Flanagan*, which is not yet reported (a), the present Master of the Rolls decided, at the hearing of the cause, as he had previously, on a motion for an injunction (b), that the defendant, who was surety under annuity deed, and who had redeemed the annuity after the bankruptcy of *Watkins*, the grantor, had a right to proceed to execution upon a judgment recovered against *Watkins* (c) for the arrears of the annuity subsequent to the bankruptcy, notwithstanding *Watkins* had obtained his certificate under the commission. His Honour must, therefore, have thought that the latter part of the 55th section, as to the certificate of the bankrupt, is not retrospective.

Both the 121st and the 135th sections have a direct bearing upon this question. With respect to the first, it is material for the Court to consider whether it will not be liable, as a result of the construction contended for, to be involved in this difficulty — that a debt may be held proveable under the new act, but still not be barred by the certificate granted to the bankrupt, and yet, with the exception of a few anomalous cases respecting costs, the terms “proveable, and barred by the certificate,” have been considered as almost correlative. There are many cases in which it is thought most desirable to proceed against the bankrupt, and not to prove under the commission. Here the proof is most beneficial; but

(a) The case has been since reported, 3 *Russ.* 421.

(b) *Watkins v. Flanagan*, 1 *G. & J.* 199.

(c) See *Flanagan v. Watkins*, 3 *B. & A.* 186.

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wherever it is not so considered, a decision such as is now desired from the Court will necessarily affect or lessen the rights of parties, and violate the enactment in the 135th section as to the construction of the new law, “that nothing herein contained shall render invalid any commission of bankruptcy *now subsisting*, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or *affect or lessen any right*, claim, demand, or remedy, which every person now has thereunder, or upon, or against any bankrupt against whom any commission has or shall have issued, except *as is herein specifically enacted*.”

In many cases there are no effects, and in many others all the estate has been distributed under the commission, and yet the effect of the decision now required would be to deprive all parties of their remedies against the bankrupt. Supposing even in this case, that the effects had been all distributed, the petitioners would have no means of recovering their debt. The argument on the other side, as to the words “except as herein is specifically enacted,” extends to make their meaning “except as herein newly enacted,” which would render the whole clause nugatory.

Mr. Montagu.—The only case which has not been mentioned to the Court is *ex parte Shepard, ante*; 67, where the Vice-Chancellor decided that the 132d section of the 6th Geo. 4. c. 16., as to the allowance of interest to simple contract creditors, is not retrospective; but this decision was, under the circumstances of that case, wholly unnecessary, because 20*s.* in the pound had been actually paid before the new act came into operation, and the bankrupt’s right to the surplus

vested immediately, and could not be affected by the subsequent enactment. In this respect it was within the principle on which Lord *Eldon* acted in *ex parte Ruck*.

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The LORD CHANCELLOR : —

It is most important that there should be uniformity of decision in these cases ; and I must therefore examine the Vice-Chancellor's decision, and consider how far it militates against other decided cases.

The case stood over for judgment until this day.

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The LORD CHANCELLOR : —

The question, in this case, arises out of the bankruptcy of *George Russell*. In the year 1772, Mr. *Russell* executed a settlement, by which, in consideration of his then intended marriage and of his wife's portion, he covenanted that his executors or administrators should, upon his decease, in case his wife or any issue of the marriage survived him, pay to the trustees the sum of 2,000*l.*, to be apportioned amongst such issue ; and, at the same time, for securing the performance of the covenants in the settlement, a bond, in the penal sum of 4,000*l.*, was executed by Mr. *Russell*. In July 1803 a commission of bankrupt issued against Mr. *Russell*, under which dividends, to the amount of twelve shillings in the pound, have been paid ; and a further and final dividend has since been advertised, under a renewed commission, which issued in 1828. Mr. *Russell*, it appears, survived his wife, and died in the month of February 1825, leaving three children, on whose behalf a petition was presented to the Vice-Chancellor, for leave to prove the sum of 2,000*l.* under the renewed commission, and to receive

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There was, in this case, therefore, a contingent debt, a debt contingent upon an event which had not happened at the time of the issuing of the commission in 1803. According to the law, as it existed previously to the passing of the 6th of George 4th, c. 16., it is clear that this debt was not proveable; and the point for determination now, is, whether it can be proved under the provisions of the 56th section of that act. In opposition to the claim, it was contended, that upon a proper construction of the clause in question, it can only be applied to commissions issued since the present bankrupt act came into operation; and that here not only did the commission issue, but that the contingency itself actually happened before the statute took effect. It becomes necessary, therefore, to consider whether, upon a careful examination of the act, but more especially of the 56th section, it can be properly applied to past as well as to future commissions, and also whether it is applicable to cases where the contingency happened prior to the 1st of September 1825, the time fixed for the statute to take effect.

Confining my attention, in the first place, to the words of the 56th section alone, they appear to me, in terms, to apply as completely to a contingency which happened before as to a contingency occurring after the time when the act came into operation. The words are, "That if any bankrupt shall, before the issuing of the commission, have contracted any *debt* payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to

the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon." Here certainly there are no expressions confining the operation of the clause to the future. It seems equally applicable to past and to future commissions. But with respect to the contingency happening before the passing of the act, there is one part of the clause only which does not apply to a case of this description. The commissioners are not required, nor is it necessary for them to set a value upon a contingency which has happened. On the occurrence of the contingency, the sum to be proved is known, and the proof is expressly provided for by the words which follow: "Or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends."

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Such is the construction which I should be disposed to put upon the 56th section, if it stood alone; but great light is thrown upon the intention of the legislature by reference to other clauses of the act. In that immediately following, (the 57th,) which enables the holder of any bill of exchange or promissory note to prove for interest, where interest is not reserved by the instrument, and it is over due at the issuing of the commission, the words are: "That in all *future* commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, over due at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the com-

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missioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes." It is an argument, fairly deducible from this section, that where the legislature intended to confine the act to future commissions, the intention is expressed in direct terms. The same observation is applicable to the 96th and 98th clauses, the first of which commences with the words: "That in all commissions issued *after* this act shall have taken effect," &c.; and the second with the words: "That *after* this act shall have come into effect," &c. Under these circumstances, independently of what I consider to be the obvious and legitimate interpretation of the 56th section, considered by itself, I think the construction, I have stated, is confirmed by adverting to the language used by the legislature in other clauses, where the operation of the enactment was intended to be confined to the future.

But, in the argument of the counsel for the respondents, the 135th section was cited as being at variance with this construction of the 56th section. The words relied upon were: "That nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared;" and the words which follow, "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or *affect* or *lessen* any *right*, claim, demand, or *remedy* which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted;" and it was contended that the meaning of these words are, that the statute shall not

be applied to commissions which existed previously to its coming into operation, except where it is expressly declared that the act shall apply. But this argument is inconsistent with the mode adopted to confine the operation of the statute in the 57th, 96th, and 98th sections, and would, in my opinion, extend the effect of the clause beyond the natural and obvious import of the words used.

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It remains to be observed, that the case is not devoid of authority. A question, analogous to the present, and which depended upon the construction of the clause immediately preceding the 56th section, was determined by the Court of Common Pleas in *Bell v. Bilton*, 4 Bing. 615. The judges were in that case of opinion, that where the legislature intended to confine the operation of the act to future commissions that intention has been expressed. So far, therefore, as there is any analogy between the 55th and 56th sections, I consider the decision in *Bell v. Bilton* to be in point. There have also been decisions in this Court, which appear to have been grounded upon a similar construction of the statute. These decisions were particularly stated in the course of the argument, and it is unnecessary for me to refer to them in detail.

As to the consequences of the construction to which I have adverted, it was contended at the bar that it may be productive of hardship in particular cases. It is certainly possible that it may; but in other cases, as in that before the Court, it will operate beneficially, and in the majority of instances, that can be stated, I think it will prove advantageous to creditors, and give full effect to the remedy intended by the legislature. Under all these circumstances, — adverting to the words of

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the clause itself, and to the provisions contained in other clauses in the same act — considering that the construction does not militate against the meaning of the 135th section — that it is supported by the decision in *Bell v. Bilton*, and other cases — and that the arguments on the supposed hardship and inconvenience likely to arise are not well founded — reflecting attentively upon these points, I am of opinion that the clause in question applies to commissions which were in existence when the act came into operation, as well as to those which have issued subsequently. This is a debt, therefore, proveable under the commission, and the decision of the Vice-Chancellor must be reversed.

Ordered accordingly.

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TO THE

CONTEMPORANEOUS CASES

DECIDED IN OTHER COURTS.

ACT OF BANKRUPTCY.

1. An act of bankruptcy committed before the 6 G. 4. c. 16. took effect, will not support a commission issued after that time. *Hewson v. Heard, Palmer v. Moore*, 9 B. & C. 754.

2. The act of bankruptcy may be between the time of striking the docket and the issuing of the commission. *Simpson v. Sikes*, 6 M. & S. 312.

3. A man cannot commit an act of bankruptcy by the conduct of his agent, without his knowledge. *Cotton v. James*, 1 Moody & M. 277.

4. If a creditor call by appointment upon his debtor, who is in extreme distress, and he see the debtor, who immediately leaves the room, and the jury find that he left the room, with intent to delay the creditor, the Court will not disturb the verdict. *Charrington v. Brown*, 11 B. M. 341.

5. If a builder is employed in building on the land of a proprietor, and, upon disagreeing as to the construction of the contract, the

proprietor claims to consider the builder as a debtor, on account of certain advances made to him to an extent which the builder denies, and the builder's son, who principally manages the work, removes goods to the premises of a person, who supplied some of the materials used, for safe custody, and to secure them from being taken by the proprietor, and the builder approves the discontinuance of the works, but did not direct or know of the removal of the goods, it is not an act of bankruptcy. *Cotton v. James*, 1 Moody & M. 277.

6. It has been ruled, that the declarations by a trader, upon his return home, that he had gone away for the purpose of avoiding a writ, is evidence of an act of bankruptcy, without any evidence that a writ had issued, or that he was indebted. *Newman v. Stretch*, 1 Moody & M. 338.

7. If a trader hear himself denied to a creditor by one of his family, and he do not come forward, and his remaining quiescent is from an intention to delay the creditor, it

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has been ruled that it is an act of bankruptcy. *Smith v. Moon*, 1 Moody & M. 458.

8. If the only evidence on the proceedings of the act of bankruptcy is the evidence of the bankrupt, and no objection is made at the trial, it is not any ground for a new trial. *Jacobs v. Latour*, 2 B. M. 203; 5 Bing. 131.

ANNUITY.

A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan*, 3 Russ. 421.

ARBITRATION.

Whether, in general, bankruptcy revokes submission to arbitration is not settled. Per Lord Tenterden. *Marsh v. Wood*, 9 B. & C. 664.

ARBITRATION, REVOCATION OF SUBMISSION TO.

If one of two parties who have submitted disputes to arbitration become bankrupt, if all his interest in the matters in dispute pass to the assignees, the other may revoke the submission, without being liable to an action. *Marsh v. Wood*, 9 B. & C. 664.

ARREST.

1. If proceedings are commenced against bail, whose principal has become bankrupt, and their surrendering the bankrupt will be attended with expence to his estate, and inconvenience to him in making out his accounts, and passing his examination, the Court of King's Bench will enlarge the time for the bail to surrender the bankrupt. *Offley v. Dickens*, 6 M. & S. 349.

2. A bankrupt may be taken by his bail for the purpose of rendering him, notwithstanding his privilege from arrest; and if they neglect to take him they may be fixed. *Payne v. Spencer*, 6 M. & S. 237.

ASSIGNEES.

1. An action need not be commenced against an assignee within three months after the cause of action. *Carruthers v. Payne*, 5 Bing. 270.

2. Leave given to assignees to bid for part of the bankrupt's estate, a meeting of the creditors having previously given their sanction to the application. *Anonymous*, 2 Russ. 350.

ASSIGNMENT.

1. If a debtor agrees to assign all his property in trust for his creditors, upon the usual covenants, and to be void if not signed before a given day by all the creditors, and the trustees sell the property and pay ten shillings in the pound, and the trustees tender a convey-

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ance, without a clause for a release, which the debtor objects to sign, and a meeting of creditors is adjourned, that it may be ascertained whether a creditor, who has not executed within the time mentioned, will execute:—an action cannot be maintained by a creditor who has executed, until it is ascertained that the other creditor will not execute. *Tallock v. Smith*, 6 Bing. 339.

2. The execution by the debtor of a deed of trust, which is an act of bankruptcy, is not in the nature of an escrow before it is executed by the trustees. *Simpson v. Sikes*, 6 M. & S. 312.

3. An assignment by bankers, in failing circumstances, and who had stopped payment, of all their estate and effects to trustees for the benefit of their creditors, is an act of bankruptcy, although the assignment be made merely for the purpose of making an act of bankruptcy. *Simpson and others v. Sikes and others*, 6 M. & S. 295.

AUCTION DUTY.

It seems that a sale by a mortgagee of the bankrupt's property is not liable to the auction duty. *Bleaden v. Hancock*, 1 Moody & M. 466.

BANKRUPT ACT, CONSTRUCTION OF.

1. The word *delivery* in sect. 3. is of very general signification, but being connected with the words gift or transfer, it seems that in interpretation it must be confined to transactions of the same nature. Per

Lord Tenterden. *Cotton v. James*, 1 Moody & M. 277.

2. It has been ruled, that a gift of money is not within section 73. *Abell v. Daniell*, 1 Moody & M. 371.

3. Section 92 of 6 G. 4. c. 16. has not a retrospective operation. *Key v. Cook*, 2 M. & P. 720.

4. The 82d section, with respect to payments after an act of bankruptcy, has a retrospective operation. *Churchill v. Crease*, 5 Bing. 180.

5. The 27th section of 6 G. 4. c. 16. does not give power to break open all houses, &c. where the bankrupt's property is reputed to be, but only any house, &c. of the bankrupt's. Per Bayley, J. *Edge v. Parker*, 8 Barn. & C. 700.

6. The right construction of 6 G. 4. c. 16. s. 44., as to the time within which an action must be commenced, appears to be, that if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, this is not done in pursuance of the statute, and he is responsible for it. Per Bayley, J. *Edge v. Parker*, 8 B. & C. 701.

7. The 82d section of 6 G. 4. c. 16., respecting payments without notice of an act of bankruptcy, is retrospective. *Terrington v. Hargreaves*, 5 Bing. 489.

BANKRUPT.

If, after a commission has issued, the supposed bankrupt, an auctioneer, and the assignees meet, a short time before the sale of the goods, and consult as to the best means of

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disposing of the property, and the supposed bankrupt is, at the time when the commission issues, in possession of an unproductive farm, and he gives notice to the lessor, saying, "I ———, a bankrupt, do hereby give you notice that I am ready and willing, and hereby offer to give up and deliver unto you the lease and possession;" and in consequence of this notice the lessors accept the lease, and receive possession of the premises, the supposed bankrupt is not estopped from disputing the validity of the commission. *Heane v. Rogers*, 9 B. & C. 578.

2. It has been ruled, that it is not a sufficient ground for the postponement of a trial, that the bankrupt is an important witness, and will shortly be competent, by the Chancellor's allowance of his certificate, which has been signed by the commissioners. *Tennant v. Strachan*, 1 Moody & M. 378.

3. Doubts have been entertained whether an action may be maintained, for a debt due before the commission, against a certificated bankrupt under a second commission, where 1*5s.* has not been paid. *Eiche v. Nokes*, 1 Moody & M. 303.

4. It has been ruled, that if mortgaged property is sold with the bankrupt's goods, but without the sanction of the assignees, their returning a copy of the catalogue to the excise office, with a declaration subscribed by them that the goods belong to the bankrupt, for the purpose of exempting the goods from auction duty, it is not an adoption of the sale by the assignees. *Bleaden v. Hancock*, 1 Moody & M. 466.

BANKRUPT — LESSEE.

If a lessee become bankrupt, the term remains vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provisions of 6 G. 4. c. 16. s. 75. *Tuck v. Pyson*, 6 Bing. 330.

BANKRUPT — PLAINTIFF IN EQUITY.

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick v. Masson*, 1 Sim. 501.

CERTIFICATE.

1. An attorney, in custody, when a commission issues against him, upon an attachment for nonpayment of money, is discharged by his certificate. *Rez v. Edwards*, 9 B. & C. 652.

2. If a creditor sue a surety on a guarantee, and the principal debtor become bankrupt, and the creditor prove the debt; and the surety give notice to the creditor that, though he does not admit his liability as surety, he shall, if the creditor sign the certificate, hold himself altogether discharged; and, after issue joined in the action, but before trial, the creditor sign the certificate, which, without such signature, the bankrupt could not obtain, and the certificate is allowed, and the creditor obtain judgment in the action, the surety is not discharged from his liability. *Broune v. Carr*, 2 Russell, 600.

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3. A demand for goods bargained and sold, to be delivered at a future day, which is after the commission, is not barred by the certificate of the vendee. *Boorman v. Nash*, 9 B. & C. 145. But note the words of 6 G. 4. c. 16. s. 47. are "contracted any debt or demand," &c.

4. Where a creditor who has proved is fully paid by the surety, he cannot afterwards sign the certificate. *Ratcliffe v. Gurnson*, 6 Mad. 193.

5. It has been ruled, that it is not a sufficient ground for the postponement of a trial that the bankrupt is an important witness, and will shortly be competent, by the Chancellor's allowance of his certificate, which has been signed by the commissioners. *Tennant v. Strachan*, 1 Moody & M. 378.

CHOSE IN ACTION.

A trustee under the 54 G. 3. c. 137. (Scotch bankrupt act) cannot sue in his own name for a chose in action. *Jeffery v. M^r Taggart*, 6 M. & S. 126.

COMMISSION OF BANKRUPT.

A covenant not to sue, arrest, implead, or prosecute a debtor, or his goods or chattels, lands or tenements, on account of a debt, extends to the issuing of a commission, which is a species of suit and proceeding against the goods of the bankrupt. *Small v. Marwood*, 9 B. & C. 300.

COMMITMENT.

1. It has been intimated, that a commitment which does not set out all the questions is not bad, if it appear on the warrant that the prisoner did not make any objection to the questions, or that the prisoner has answered all questions put to him. *Ex parte Leake*, 9 B. & C. 236.

2. Upon a commitment for refusing to sign, the conclusion should be that he be committed until he sign; and if the conclusion is until he shall submit himself, and full answer make to the satisfaction of the commissioners to all such questions as shall be put to him, and sign and subscribe his examination, the warrant is defective, and the prisoner entitled to his discharge. *Ex parte Leake*, 9 B. & C. 235.

3. A bankrupt, brought up by habeas corpus, is not to be discharged because the return to the writ sets forth the warrant of committal imperfectly, and in such a case, the Lord Chancellor, before he enters upon the question of the validity of the committal, will ascertain whether the warrant is truly set forth in the return, and if it is not so set forth, he will order the return to be amended. *In re Power*, 2 Russ. 583.

COMPOSITION.

All that is enacted by the 6 Geo. 4. c. 16. s. 133. is, that when a certain proportion of the creditors agree to take a composition, the chancellor may supersede. It does not at all interfere with the rights or securities of persons not parties to the agreement. *Per Lord Tenterden. Tuck v. Tooke*, 9 B. & C. 437.

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CONTINGENT DEBT.

A demand for goods bargained and sold, to be delivered at a future day, which is after the commission, is not proveable as a contingent debt. *Boorman v. Nash*, 9 B. & C. 145. See ex parte *Barker*, 9 Ves. 110, as to contingency not being limited to time.

COSTS.

It has been ruled, that if a person, who is not the petitioning creditor, employ an attorney to sue out a commission of bankrupt where no effects are received under the commission, he is liable to the attorney. *Pocock v. Russen*, 1 Moody & M. 358.

EVIDENCE.

1. If a creditor is by age and imbecility of mind incompetent to prove, and resided with a person who had for many years had the management of his affairs, the commissioners will be directed to admit the proof upon such evidence as shall be satisfactory to them, though the amount is 3,000*l*. Ex parte *Clarke*, 2 Russell, 575.

2. Letters found in the bankrupt's possession are evidence to shew that he received information that the fact mentioned in the letters took place. *Cotton v. James*, 1 Moody & M. 277.

3. It has been ruled, that in an action by assignees to recover sums paid by the bankrupt in preference, letters, received by the bank-

rupt from a person to whom he had applied for an advance, are evidence to the extent that the assistance was refused. *Vacher v. Cocks*, 1 Moody & M. 355.

4. It has been ruled, that in an action by assignees to recover sums paid by the bankrupt in preference, declarations made by the bankrupt about the time of the transaction, but not accompanying any act, as to his circumstances, are admissible to shew under what circumstances and why the payment was made. *Vacher v. Cocks*, 1 Moody & M. 354. See *Guthrie v. Crossley*, 2 Carr. & P. 301, and *S. P. Herbert v. Wilcocks*, Bristol Summer Assizes, 1829, in note to 1 Moody & M. 355.

EXECUTION CREDITOR.

1. The seizure of the debtor's goods, and the conversion of them into money, extinguishes the debt, so as to entitle the execution creditor to the proceeds, if such conversion is before the bankruptcy. Dict. Bayley, J. *Morland v. Pellatt*, 8 B. & C. 722.

2. If execution is issued on a judgment on a warrant of attorney; but the goods are not sold, as the defendants from time to time made payments to the officer of the sheriff to whom the whole balance is paid on the day before an act of bankruptcy is committed, and the officer pay the sum directed to be levied to the sheriff on the next day, the execution creditor is entitled to the proceeds. *Morland v. Pellatt*, 8 B. & C. 722.

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GAOLER'S RETURN.

When a return is defective by not fully stating the warrant, the judge may ask the gaoler in court whether the warrant is or is not fully set forth, or the whole of warrant may be set forth by the affidavit of those who oppose the prisoners discharge. In *re Power*, 2 Russell, 584.

HABEAS CORPUS.

The Vice-Chancellor seems in one case to have discharged on habeas corpus. Ex parte *M'Gee*, 6 Madd. 206.

ISSUE.

1. If, upon hearing a petition to supersede for fraud in concocting a trading and petitioning creditor's debt, the Court requires further investigation, and an issue would not do justice to all parties interested, without occasioning great expence and great complexity in the proceedings, the Court will prefer a reference to the commissioners. Ex parte *Hudson*, 2 Russell, 457.

2. If, upon petition to supersede for fraud in concocting a trading and petitioning creditor's debt, and praying costs against several persons, an issue is directed, such directions ought to be given as to give each person interested an opportunity of protecting himself at the trial. Ex parte *Hudson*, 2 Russell, 457.

JUDGMENT CREDITOR.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff for monies levied under an execution upon a judgment by *nil dicit*. *Mitchell v. Knott*, 1 Sim. 497.

LESSEE.

If a lease is delivered up by the lessee, in pursuance of 6 G. 4. c. 16. s. 75., it does not operate, by relation, as a surrender of the lease from the date of the commission. *Tuck v. Fyson*, 6 Bing. 330.

LIEN.

1. It seems that there is not any lien by a stereotype printer on the plates for his general balance. *Bleaden v. Hancock*, 1 Moody & M. 466.

2. Whether a printer who has a general lien on stereotype plates has a right to sell has been doubted. *Bleaden v. Hancock*, 1 Moody & M. 466.

MORTGAGEE.

If a mortgagor, in possession, become bankrupt, and the mortgagee give notice to the tenants to pay him the by-gone rents, a payment to the mortgagee is good against the assignees of the mortgagor. *Pope v. Biggs*, 9 B. & C. 245.

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NOTICE OF ACTION AGAINST ASSIGNEES.

Where the assignees of a bankrupt enter the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 G. 4. c. 16. s. 44. *Edge v. Parker* 8 B. & C. 697.

PARTNERSHIP.

A. being entitled, under a parol partnership agreement with B. and C., to three eighths of the capital and profits of the business, became bankrupt, being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation; the assignees claimed a share of the profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at that time. In consequence of this difference, no settlement of accounts between the bankrupt's estate and the partnership took place, and the assignees filed their bill; but B. and C., and afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and the stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.:

Held, that the assignees of A. were entitled to three eighths of the profits which had been made or should be made until the concern was finally wound up, and to three eighths of the money, to be produced by the sale of what remained, in specie of the capital and stock; and that A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business beyond his share of the original capital. *Crawshaw v. Collins*, 2 Russ. 325.

PAYMENT PROTECTED.

If a prisoner obtain a day rule to receive from an insurance office the amount of a loss by fire, and a creditor, knowing the day when the money was to be paid, press for and obtain payment on the same day, and there is not any fraud, the payment is protected by 6 Geo. 4. c. 16. s. 82. *Churchill v. Crease*, 5 Bing. 178.

PETITIONING CREDITOR'S AFFIDAVIT.

The provision in the statute requiring an affidavit on striking a docket, that the party is bankrupt, is directory only, and the commission would be valid without any such affidavit. *Simpson v. Sikes*, 6 M. & S. 311.

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PETITIONING CREDITOR'S DEBT.

1. It has been agitated, whether a debt, founded upon notes of a country banker, payable on demand, where no demand had been made, is sufficient to support a commission; but a prior debt is not extinguished by such notes having been given. *Simpson v. Sikes*, 6 M. & S. 295.

2. If by a composition deed an insolvent assign to four trustees all his goods, for the benefit of his creditors, provided the trustees and the creditors on or before a given day prove their debts, if required, and execute the deed, and there is a covenant by the trustees and creditors that they will not arrest, implead, or prosecute the debtor, or any of his goods, chattels, lands, or tenements, on account of their debts, and on such suing or prosecution the deed shall be a discharge; and the deed is executed by two only of the trustees, the debt of a trustee who has executed it is extinguished, and he cannot sue out a commission of bankruptcy on it. *Small v. Marwood*, 9 B. & C. 300.

3. If the deposition of the petitioning creditor's debt is as indorsee of a bill of exchange, it is not sufficient unless it appears that the bill was outstanding against the bankrupt before the act of bankruptcy. *Key v. Cook*, 2 M. & P. 790.

4. It has been ruled, that a debt for money lent on mortgage, payable after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt, without any notice given, and more than six months before the certain day. *Hill v. Harris*, 1 Moody & M. 448.

PETITION.

A motion cannot be made to adjourn a petition in bankruptcy; a petition in the bankruptcy is necessary for that purpose. In *re Hardy and Dale*, 6 Mad. 252.

PETITION TO SUPERSEDE.

If, upon a petition to supersede by a creditor, where judgment on a warrant of attorney is alleged by the respondents to have arisen out of usurious dealings, which the petitioner denies, the validity of the debt of the petitioner ought, in the first instance, to be ascertained. Ex parte *Hudson*, 2 Russ. 456.

POLICY OF ASSURANCE.

If a trader effect a policy of assurance on his life, and assign it to a creditor, and the creditor do not give notice to the office, and the office neither requires notice to be given to give effect to the validity of assignments, nor recognizes such notice when given, the interest in the policy passes to the assignees under the commission. *Williams v. Thorp*, 2 Sim. 259.

PROCEEDINGS IN EQUITY.

1. Proceedings in bankruptcy are not proceedings in equity. *Crowder v. Davies*, 3 Y. & J. 433.

2. A demurrer does not lie to a bill by assignees, on the ground that it does not state the suit to be in-

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stituted with consent of the creditors or of the commissioners. *Jones v. Yates*, 3 Y. & J. 373.

PROOF.

1. If a trader agree to purchase goods, to be delivered on a future day, which has not arrived when the commission issue, the difference between the value of the goods and the purchase money is not proveable. *Boozman v. Nash*, 9 B. & C. 145.

2. Where a creditor is disabled by age and imbecility of mind from proving, by his own oath, a debt against the estate of a bankrupt, the commissioners will be directed to admit the proof upon such evidence as shall be satisfactory to them, though the debt be of considerable amount. Ex parte *Clarke*, in the matter of *Waugh*, 2 Russ. 575.

PURCHASER.

A *bond fide* purchaser, for ready money, of goods sold, after an act of bankruptcy, without notice, is entitled to retain them under a commission which issues within two months, if the assignees do not repay the money. (a) *Hill v. Farnell*, 9 B. & C. 45.

RECEIVER.

A receiver, who had omitted to account regularly, became bank-

(a) But whether the assignees could pay the money and rescind the contract is not settled.

rupt, being indebted to the trust estate in a large sum; and for some time no steps were taken to have his accounts duly passed: Held, that, under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. *Dawson v. Raynes*, 2 Russ. 466.

REFERENCE.

If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, bills and notes of such an amount that, if assistance is not given, the bank must fail, and such assistance is not given, it is a preference, although, at the time, there is not any contemplation of an act of bankruptcy. *Simpson v. Sikes*, 6 M. & S. 316.

2. It has been ruled, that a fraudulent gift of money, in contemplation of insolvency, may be avoided by the assignees. *Abell v. Daniell*, 1 Moody & M. 371.

3. It has been ruled, that the delivery of goods upon a threat of arrest is not a payment within section 82. *Smith v. Moon*, 1 Moody & M. 458.

REFERENCE TO COMMISSIONERS.

A reference to the commissioners, to review the proof of the trading and of the petitioning creditor's debt, substituted for the trial of an issue as to the validity of the commission. Ex parte *Hudson*, in re *Ramsden*, 2 Russ. 456.

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REPUTED OWNERSHIP.

1. If notice of the assignment of a policy of assurance on a life is not given to the insurers, it remains, upon the bankruptcy of the assignor, in his order and disposition, although the office do not require notice, and keep no book or registry of notices which might be given. *Williams v. Thorp*, 2 Sim. 257.

2. If, after a chariot is built and paid for, and after it is finished, the purchaser direct a front seat to be added, but, the coachmaker being slow in the execution of the addition, the purchaser sends for the chariot six or seven times, and the coachmaker promises to deliver it; and, subsequently, the purchaser, being dissatisfied, orders the chariot to be sold, and it is, according to the custom of trade in such case, standing in the coachmaker's warehouse for that purpose, the front seat not having been added, when a commission issues against the coachmaker, the chariot does not pass to the assignees. *Carruthers v. Payne*, 5 Bing. 270.

SET-OFF.

1. If a debtor write to his creditor, saying: "Inclosed please to receive two bills, value 1,740*l.*, which place to our credit; and we have to request that you will pay in cash and in course 900*l.* on our account to Messrs. Ransom and Co., bankers; and that you will place the balance, when discounted, to our credit;" and if the letter arrive after the creditor has stopped payment, and the creditor do not procure the bills to be discounted, he cannot set-off any part of the proceeds against his

debt. *Buchanan v. Findlay*, 9 B. & C. 740.

2. If bills are sent by a debtor to a creditor for a specific purpose, the creditor cannot apply them to another purpose. *Buchanan v. Findlay*, 9 B. & C. 748.

SHORT BILLS.

If short bills are delivered by a banker, on the eve of his bankruptcy, to a third person, who receives payment, and pays the money to the assignees, trover does not lie, but assumpsit. *Tennant v. Strachan*, 1 Moody & M. 378.

SOLICITOR.

It is not requisite that a bill for business in bankruptcy should be taxed under 6 Geo. 4. c. 16. s. 14. before the commencement of an action. *Crowder v. Davies*, 3 Y. & J. 433.

2. An attorney's bill for business in bankruptcy need not be delivered to the assignees a month before an action is commenced. *Crowder v. Davies*, 3 Y. & J. 433.

SURETY.

1. A creditor, pending an action on a guarantee against a surety, who contests the question of his liability, proves the debt under a commission of bankrupt against the principal debtor, and by his signature enables the bankrupt to obtain his certificate, though the surety had given him notice not to sign it; the surety

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is not thereby discharged from his liability on the guarantee. *Browne v. Carr*, 2 Russ. 600.

2. A surety for a lessee is liable in respect of breaches of covenant which accrue after the date of a commission against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under 6 G. 4. c. 16. s. 75. *Tuck v. Fyson*, 6 Bing. 330.

SURRENDER.

Time enlarged for bail to surrender their principal, who had become a bankrupt, for the purpose of his examination. *Offley and others v. Dickens*, 6 M. & S. 348.

TRADING.

1. If a person manufacture bricks from his own estate, and, according to the usual mode of burning the clay into bricks, he buys chalk and burns it with the clay, not for the purpose of carrying on lime-burning as a business, but as the most convenient mode of burning the clay into bricks, it is not a trading, although the use of the chalk was not necessary for the manufacture of the bricks, and he subsequently sell the lime produced in the process. *Paul v. Dowling*, 1 Moody & M. 267.

2. If a person burn chalk, not the produce of his own land, and sell the lime, it is a trading. *Paul v. Dowling*, 1 Moody & M. 267.

3. A person who burns chalk, the produce of his own land, and sells the lime, is not, as it seems, a trader. *Paul v. Dowling*, 1 Moody & M. 267.

4. A man is not a trader for manufacturing and selling bricks,

the produce of his own estate. *Paul v. Dowling*, 1 Moody & M. 267.

5. If a lime-burner commence the building a large mansion-house on his estate, and employ nearly all the bricks and lime made at the kiln, and considerable quantities of lime besides for that purpose, and from the time of commencing the building he continues to purchase chalk, but very nearly discontinues any sale of lime, except in some few instances, and generally under particular circumstances, as to be spread on the lands of tenants or neighbours, or to be used in the repairs of houses in the parish, on some reason of urgent haste, and there are some instances in which no such explanation is given, but in every case the lime is paid for, and the whole quantity sold does not exceed five quarters, during a period in which the kiln has produced not less than 300 quarters of lime, of which the rest is employed about the building, the question, whether this is a continuance of the trading, depends upon its having been with intent to keep the trade in existence after the house was finished, or merely to accommodate the purchasers. *Paul v. Dowling*, 1 Moody & M. 267.

6. A trading which ceased before the 6 G. 4. c. 16. took effect, will not support a commission issued after that time. *Surtees v. Ellison*, 9 B. & C. 750.

7. If a person buy a piece of land in fee, partly for the purpose of making bricks, and the payment is to be by instalments, and 4s. per 1,000 is to be paid to the vendor, in part liquidation of the purchase money, and bricks are made from soil dug from the land, and sold, this is not a trading. *Heane v. Rogers*, 9 B. & C. 578.

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TROVER.

Trover will lie against the assignees, under a commission against a banker, for the proceeds of short bills received by the assignees after the bankruptcy. *Tennant v. Strachan*, 1 Moody & M. 378.

TRUST.

If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, money, bills, and notes, and such assistance is not given, and the London banker, after the bankruptcy, convert the bills and notes into money, the assignees, under a commission against the country bankers, may maintain assumpsit for the money. *Simpson v. Sikes*, 6 M. & S. 318.

WARRANT OF ATTORNEY.

If a warrant of attorney is filed, with an affidavit made by the attesting witness, which states that he "saw the warrant of attorney, bearing date the 25th April 1827, duly signed, sealed, and delivered," but does not specify the day on which it was executed, the affidavit is not in conformity with the directions of the 3 G. 4. c. 39. s. 1 & 2., and the warrant of attorney, the judgment

and execution thereon, is void as against the assignees of the defendant, and they may maintain trover against the sheriff for goods seized by him under a *fi. fa.* issued upon such judgment, and sold after the commission. *Dillon v. Edwards*, 2 M. & P. 550.

WARRANT OF COMMITMENT.

The warrant of commitment of a bankrupt, being by mistake dated the 2d March, instead of the 2d of February: Held, that this is not such an error as can be amended under the 18th section of Geo. 2. c. 30. Ex parte *M^r Gee* in re *M^r Gee*, 6 Mad. 206.

WITNESS.

In an action, on a bill of exchange, against the acceptor for the accommodation of the drawer, the drawer who has obtained his certificate, is a competent witness for the defendant, to prove that the bill had been usuriously discounted. Per Lord Tenterden, C. J. *Ashton v. Longes*, 1 Moody & M. 127.

2. It has been ruled, that in an action by the assignees the bankrupt is not a competent witness, unless his release and certificate is produced. *Goodhay v. Henry*, 1 Moody & M. 320. Anon. in note to *Goodhay v. Henry*.

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CASES

IN

BANKRUPTCY.

Ex parte BOLLAND.—In the matter of MARSH, STRACEY, FAUNTLEROY, and GRAHAM.

L. C.
October 23,
1828.

IN the year 1825, a petition was presented by *Stone* and *Gahagan*, stating, that in May 1819 there was standing in the books of the bank of England, in their names jointly with *Fauntleroy*, 17,061*l.* 12*s.* 4*d.*, navy five per cent. annuities, as trustees under the will of Sir *T. B. Plaistow*; that in 1819, and until the death of *Sibbald*, the bankrupts and *Sibbald* were, and since his death the bankrupts continued to be, the bankers of such trust account; that the dividends on such annuities were usually received by *Fauntleroy*, and credited to the said account; that on the 26th of May 1819 *Stracey* attended at the Bank, and tendered a power of attorney, purporting to be executed by the petitioners and *Fauntleroy*, authorizing *Marsh*, *Sibbald*, *Stracey*, and *Graham*, jointly, and each separately, to sell, assign, and transfer all or any part of 16,000*l.* part of the said annuities, and indorsed on the back of such power a demand to act, and by virtue thereof transferred, as

If one of three partners obtain by forgery a sum from the sale of stock, which he, in fraud of his partners, pays into the banking house, and withdraws it, it is proveable against the joint estate by the stock proprietor, although he has not prosecuted or given evidence against the convicted felon.

See also similar case in the same Bank 9 / Nov. 12. Apr. 570

1828. the attorney of the petitioners and *Fauntleroy*, 7,000*l.*,
Ex parte part of such annuities, and signed receipts, in the usual
BOLLAND. form, for the consideration money ; that the petitioners
 In the matter never executed or authorized such power of attorney ;
 of that the transfers were made by *Stracey*, in fulfilment of
MARSH previous contracts of sale effected by the regular broker
 and others. employed by the house of *Marsh* and Co., pursuant to
 an order received from the house in the usual course
 of business ; that the consideration money for the
 transfer by *Stracey* was received by the broker, and by
 him paid to the account of the house of *Marsh* and
 Co., at *Martin, Stone, and Co.*'s, with whom the house
 of *Marsh* and Co. kept a banking account, and was
 carried to the credit of *Marsh, Stracey, Fauntleroy,*
Graham, and Sibbald ; that on the 28th May 1819
Graham attended at the Bank, and by virtue of the said
 power of attorney transferred, as the attorney for the peti-
 tioners and *Fauntleroy*, 7,811*l.* 13*s.*, and signed receipts
 in the usual form, as the attorney for the petitioners and
Fauntleroy ; that such last transfers were also made in
 fulfilment of contracts of sales previously effected by the
 regular broker of the house of *Marsh* and Co., and the
 consideration money for such transfers was, after deduct-
 ing the amount of brokerage, paid to the account of
Marsh and Co. at *Martin and Co.*'s, and duly carried
 to their credit ; that the broker, upon all sales effected
 by him for the house of *Marsh* and Co., allowed
 them a moiety of the usual commission, and did so
 upon these several sales ; that notwithstanding such
 transfers, the dividends which would have become due
 on the sum of 17,061*l.* 12*s.* 4*d.* annuities were regularly
 credited by *Marsh* and Co. in the trust account, as if the
 same continued to be received at the Bank ; that the
 several sums of annuities so transferred had become
 mixed and blended with other sums in the names of the

transferrees, and could not then be followed so as to be distinguished.

The petition prayed permission to prove the 16,000*l.* against the joint estate of *Marsh* and Co.

It appeared upon the affidavits that these transfers were all effected by the forgery of *Fauntleroy*, and were a fraud by him upon his partners.

Upon this petition the LORD CHANCELLOR (Lord *Eldon*) on the 13th of May 1825, ordered the following issue to be tried in the Court of King's Bench: "Whether the bankrupts were, at the date and issuing of the commission against them, indebted to *Stone* and *Gahagan* and *Fauntleroy* in the sum of 16,000*l.*, or in any and what other sum; and directed that no objection should (a) be taken to the proceeding to the final determination of such issue, on the ground that *Fauntleroy* was interested as a trustee jointly with *Stone* and *Gahagan*, and also a partner with *Marsh*, *Stracey*, and *Graham*."

On the trial of such issue a verdict was found in the affirmative, subject to the opinion of the Court, whether the fact of the letter of attorney being forged affected the right of the plaintiffs to recover. (b)

(a) The words of the order, as far as relates to this point, are as follow: "Whether the above-named bankrupts were, at the date and suing forth of the commission of bankrupt against them, indebted to *Wm. Stone*, *Henry Gahagan*, and *Henry Fauntleroy*, in the sum of 16,000*l.*, or in any and what other sum of money; and that upon the trial of the said issue, no objection should be taken to the proceeding to the final deter-

mination of the said issue, on the ground that the said *Henry Fauntleroy* was interested as trustee jointly with the said *Wm. Stone* and *Henry Gahagan*, and also a partner with the said *Wm. Marsh*, *Josias Henry Stracey*, and *George Edward Graham*."

(b) The case at *Nisi Prius* is reported in 1 *Ryan & Moody*, 368. The following is the direction of the Chief Justice:

"*Abbott*, Lord C. J. In sum-

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This case was argued in the Court of King's Bench in Easter Term 1827, when it was adjudged that the debt was proveable. (a)

ming up to the jury. The question in this case has evidently arisen out of the forgery of this power of attorney; but as the considerations on that point are entirely matter of law, and involve very great difficulty, I think the parties ought to have the benefit of a more mature deliberation than can be given here to that point. The only way that this question can be put to you is to assume that the power is valid, and then see whether or no the defendants are answerable for this sum of money, and we must view the question as if the same person were not answerable on both sides. Now taking the power as valid, you find that it authorizes all and each of the partners to act upon it; that two of them do in fact act; each signs the receipt for the part transferred by him; the broker receives the money and pays it to *Martin* and Co. to the credit of *Marsh* and Co. Upon these facts the money most unquestionably was paid to *Marsh* and Co., or to their credit. But then it is said that they are not answerable, because by their peculiar and extraordinary mode of conducting their business, the money never found its way to their use. That may be good as

between them and *Fauntleroy*, but as between them and the plaintiffs it cannot by possibility be any defence, that they have suffered one of their own partners to embezzle it. But they say also that *Fauntleroy* was one of the persons entitled, and that he has drawn it out, and, therefore, they are not answerable. Now if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority ought to be given to that effect to the bankers: that, in my experience, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment has been made to one only of several who are jointly entitled to receive it. If, according to the ordinary course of business, he was not solely entitled to receive this money, then payment to him is no discharge, and you will find your verdict accordingly."

(a) The report of this argument and judgment is in *6 B. & C. 551*. The judgment was as follows:

A petition for a new trial was presented by the assignees, which was refused by the Lord Chancellor

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Lord *Tenterden*, C. J., now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows: "The defendants in this case are, by the order of the Lord Chancellor, prevented from taking any objection on account of the particular situation of *H. Fauntleroy*, as being both a proprietor of the stock sold, and a partner in the banking house; and the case is, therefore, to be considered as a case between the plaintiffs, proprietors of navy five per cent. annuities, on the one part, and the defendants, as a banking house, on the other part. And it appears by the case, that the defendants' house, by means of sales of the annuities made under the orders of the house, and transfers signed, part by one of the defendants and part by another, received the price and proceeds of the annuities; that the money was paid by the broker, who effected the sales, into the defendants' house by a payment to their agents in the city; that it was so paid generally, and was never appropriated by the house to any particular account; not to the account of *H. Fauntleroy*, as was assumed in one part of the argument for the defendants; nor to the account of the trus-

tees, who had not, in fact, any account with the house; nor to the account of the executors of the person, of whose estate these annuities had formed a part, and who had an account with the house; and therefore, being so paid in, and not placed to any particular account, cannot have been drawn out, but must be taken to have remained in the hands of the house at the time of the bankruptcy. Upon this state of facts it cannot be doubted that it was the duty of the house to place the money to the credit of the trustees, and retain it for their use, and subject to their order, and that no ignorance on the part of any of them, even supposing all but one to have been ignorant of the facts (which, however, cannot have been), nor any neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the plaintiffs were no parties, can deprive the plaintiffs of their right to their money. And these facts were all that it was incumbent on the plaintiffs to prove in order to shew their right to the money. It was not necessary for them to shew that the sale of the annuities was made with their authority; for even

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(*Lord Lyndhurst*), and another petition was presented by *Stone and Gahagan*, upon which the Lord Chancellor

if made without their authority, and by an act wrongful toward them, they might by law waive the wrong, and demand the money, as is done in many other cases.

“The other facts stated in the case, of which one alone is of any importance, are brought forward on the part of the defendants, and it remains to be considered whether that fact defeats the plaintiffs’ claim. That fact is, that the transfers were made under a forged power of attorney, forged by *H. Fauntleroy*, a member of the defendants’ house. The authority was forged by and not to him; the instrument does not profess to give him any authority to sell the annuities; the authority is expressed to be given to the other members of the house jointly and severally, and could not be executed by some of them, as, in fact, it was. They ought to have satisfied themselves of the validity of the authority before they acted upon it. This forgery was a capital felony; and it is, therefore, urged on behalf of the defendants, that there has been no valid transfer of the annuities; that the Bank of England is answerable to the plaintiffs for having permitted the transfers to have been made without their authority; and that

the buyers are also answerable as having taken by purchase from persons who had no authority to sell. It is not necessary to say whether the plaintiffs had or had not these remedies, or either of them; because, generally speaking, where an injured party has different remedies against different persons, he may elect which he may pursue; so that the question is, whether the plaintiffs have the remedy they now seek? The transfers were made, and the money received, in pursuance of a felony committed by a member of the defendants’ house. Can the house set up this felony as an answer to the plaintiffs’ claim? In general, a man cannot defend himself against a demand by shewing, on his part, that it arose out of his own misconduct, according to the maxim, ‘*Nemo allegans suam turpitudinem est audiendus.*’ There is, indeed, another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he may do, if there has not been a sale in market-overt; but that he shall

ordered that the debt should be proved. His lordship's judgment was as follows :

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not sue the felon ; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own shewing, to be founded on the felony of the defendant. *Gibson v. Minet*. This is the whole extent of the rule. The rule is found on a principle of public policy ; and where the public policy ceases to operate, the rule shall cease also. This point was very ably shewn in the argument on the behalf of the plaintiffs. The authorities were quoted, and need not be repeated ; and it was shewn that the familiar phrase, ' the action is merged in the felony,' is not at all times and literally true. Now, public policy requires that offenders against the law shall be brought to justice ; and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony, without suit ; and, of course, cannot be allowed to maintain a suit for such a purpose. But it is not contended that any such policy or rule is applicable to the present case : the offender has suffered the extreme sentence of the law for another offence of

the same kind. It does not appear that the plaintiffs had any knowledge of the particular forgery mentioned in this case, at such a time as might have enabled them to bring the offender to justice sooner, or even if they had been acquainted with the fact of the forgery, that they could, in ignorance of the place of the forgery, and of the means by which the forged instrument was placed in the Bank of England, have instituted a prosecution with success ; and it was very properly admitted by the learned counsel for the defendants that he could not contend that an action might not be maintained after conviction of the felon. But it was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or a felonious act, and that here the plaintiffs were seeking to ratify the felonious act of *Henry Fauntleroy*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect in fact ; the plaintiffs do not seek to ratify the felonious act ; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money

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Adverting to the statement of facts that has been presented for my consideration, I cannot bring myself to entertain any doubt upon this case. If I am incorrect in my view of the evidence, I may alter my opinion ; but, at present, from what I have collected, the facts are these :— The petitioners and *H. Fautleroy* were entitled, as trustees, to certain stock : under a joint and several power of attorney to the members of the house of *Marsh* and Co., (purporting to have been executed by the petitioners and *Fautleroy*,) one member of the house went to the Bank of England, and sold out a part of the stock ; upon a subsequent occasion another member of the house went to the Bank, and sold out another part of the stock ; the proceeds were paid into the house of *Martin* and Co., who were the bankers of *Marsh* and Co. I think, therefore, in point of law, that the payment of the proceeds of this stock into the house of *Martin* and Co. was a payment of the proceeds into the

produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made. If public policy had required that the felonious inducement should prevent a claim to the money afterwards received, as it would do if an action were brought against the felon for the money received by a transfer obtained by his felony

in lieu of a prosecution for the felony, a defence of another kind would be given. But this is not the present case, and not being so, we think the plaintiffs may entirely pass by the felony, and rely on the transfer and receipt of the money, and that the defendants cannot protect themselves against the demand for the money which they have received, by shewing this felony on the part of one of the members of their house. The *postea*, therefore, is to be delivered to the plaintiffs."

house of *Marsh* and Co. The moment the payment was made to *Martin* and Co., the amount paid stood there to the use of *Marsh* and Co.

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Then as to what subsequently took place: *Fauntleroy* drew out a part, or the whole, of this money; but in what character did *Fauntleroy* draw it out? if he drew it out as a member of the firm, that will not exonerate *Marsh* and Co. from their liability: if he drew it out in his character of trustee, he had no right so to draw, because the other trustees were necessary parties, and ought to have signed with him. I agree, therefore, with the opinion expressed in the judgment of the Court of King's Bench, that this money is to be considered as remaining in the house of *Marsh* and Co. at the time of the bankruptcy, and, remaining in the house at the time of the bankruptcy, it belongs to the trustees, and that they are entitled to prove for the amount. It does not appear to me, when the facts are examined and considered together, that any doubt arises upon the effect of them. I am not now considering the only point upon which any doubt could be entertained, namely, the felony committed by *Fauntleroy*; that has not been presented for my consideration, nor have any arguments been addressed to me to shew that the Court of King's Bench came to a wrong conclusion upon that point. Upon the transaction, as I have stated it, no doubt whatever can be entertained, and I think the petitioners are entitled to prove.

On the 31st July 1828, a petition was presented by the assignees, stating that since the proof was made, the assignees had been advised that the judgment of the Court of King's Bench was erroneous, inasmuch as it proceeded on the assumption that the stock of *Stone* and *Gahagan* had been transferred, and that *Stone* and

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Gahagan might therefore elect to proceed, either against *Marsh* and Co. or the Bank of England; whereas the supposed transfer of stock, having been under a forged power of attorney, in no way operated upon the interest of the owner of the stock, nor occasioned any such injury or damage as could give the owner of the stock a right to prove against the bankrupts; that even if *Stone* and *Gahagan* had such right of election, yet that they had, in point of fact, elected to proceed against the Bank, and had entered into an agreement with the Bank by which their claim was recognized, and the Bank had engaged to replace the amount of the stock, upon *Stone* and *Gahagan* first coming in to prove against the bankrupts' estate, and assigning such proof to them; that the fact last stated did not form any part of the special case upon which the Court of King's Bench pronounced its judgment; that these objections were not brought under the notice of the Court when the order of the 26th of July 1827 was pronounced; and the petition prayed that the said order might be reversed, or that the petitioners might be permitted to file a bill in the Court of Chancery to reverse the said order, and that the proof might be expunged.

This petition came on to be heard on 23d of October 1828.

The *Attorney General* and Mr. Serjeant *Bosanquet*, Mr. *Bickersteth*, and Mr. *Phillimore* objected to the petition being heard, on the ground that it was an application for a new trial, which had, on a former petition, been refused, and in which the parties had acquiesced; as the debt had, in obedience to the order, been proved; and as no new matter was stated as a foundation for a new application.

The objection was overruled. (a)

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(a) The following is a note of what passed on this point :

Mr. Serjeant *Wilde*, Mr. *Sugden*, Mr. *Montagu*, and Mr. *Knight* for the petitioners :—

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Upon the petition, on which the new trial was refused, there was not any argument upon the decision in the Court of King's Bench, which, at that time, had not been reported, and was assumed, as it naturally would be, to be correct in law ; and on that supposition the Lord Chancellor's judgment was founded. The report of your Lordship's judgment states as follows : " I am not now considering the only point upon which any doubt could be entertained, that is, the felony committed by *Fauntleroy* ; that has not been presented for my consideration, nor have any arguments been addressed to me to shew that the Court of King's Bench came to a wrong conclusion upon that point."

Since the order was made, the case has been reported, and it has been represented by us, who advise the assignees, that the decision of the King's Bench is erroneous in point of law ; and even if it be not, that it does not warrant the position that the debt is proveable. The question now is, whether the Lord Chancellor, sitting in bankruptcy, will not hear such reasons as can be urged why a large debt, which we say is not proveable, ought not to stand upon the proceedings : when it is the constant practice of this Court to rehear any order, where there is reason to suppose that the application is advisedly made. That it is so made appears from the allegations with which the petition concludes, and which are as follows : " That the petitioners have been advised that the judgment of the King's Bench is erroneous, inasmuch as it proceeded upon an assumption that the stock of *Stone* and *Gahagan* had been transferred, and that they might therefore elect to proceed either against the bankrupt or against the Bank ; whereas the

1828. Mr. Serjeant *Wilde*, Mr. *Sugden*, Mr. *Montagu*, and Mr. *Knight* for the petitioners :—

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After some preliminary observations, and after assuming that in general, to entitle a creditor to prove under a commission, there are three requisites :

1st. He must be entitled to maintain an action against the bankrupt.

2d. The action must be on a contract ; and

3d. It must be maintainable before the commission issued.

petitioners were advised that the supposed transfer having been under a forged power, in no way operated upon the interest of the owners of the stock, nor occasioned any real injury or damage, as could give the owners a right to prove against the bankrupts : and that they were further advised, that if *Stone* and *Gahagan* had such right of election, yet that they had, in point of fact, elected to proceed against the Bank, and had actually entered into an agreement with the Bank, by which their claim was recognized, and the Bank had engaged to replace the amount of the stock, upon *Stone* and *Gahagan* first coming in to prove against the bankrupts' estate, and assigning such proof to the Bank, which last mentioned fact did not form any part of the case upon which the Court of King's Bench pronounced its judgment. That these objections were not fully, if at all, brought under your Lordship's notice, when the order of 26th July 1827 was pronounced ; and they cited *ex parte Baker*. (a)

The LORD CHANCELLOR :— It is a matter of daily practice to apply to reverse an order ; and unless an application to reverse an order for a new trial is an exception to the general rule, which I think it is not, the petitioners are entitled to proceed.

(a) *Ex parte Baker* re. *Dann*, tion to rehear an order made by August 1829. This was a peti- Lord *Eldon* upon an appeal from

Assuming these as principles, their arguments, which were very extensive, may be stated under the following heads :

1st. Preliminary observations.

2d. The claimants could not maintain any action against the bankrupts.

3d. If they could maintain any action, it was not an action on a contract.

4thly. Whatever was the form of the action, the right did not exist before the bankruptcy.

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PRELIMINARY
OBSERVATIONS.

PRELIMINARY OBSERVATIONS.

The case upon which the judgment of the Court of King's Bench was formed was defective, and calculated to prejudice the interests of the defendants. It contained allegations which ought to have been omitted, and omitted allegations which ought to have been inserted. It was rather an imaginary than the real case; and by the form of pleading in a feigned issue, and the nature of the learned judge's charge to the jury, the whole case has not been fully discussed.

The case states, that "there was no account with the defendants' house in the names of the plaintiffs and *Faulteroy*; but there was an account in the names of the executors of Sir *Thomas Plaistow*." Improper Insertions.

This statement ought not to have been inserted. It was made to convey the idea that the trustees and executors were the same persons, and that, as there was an account with the executors, but not with the trustees, this was a difference not in substance but in form. The fact, however, is, that the trustees and executors are not the same persons.

the Vice-Chancellor; and upon the objection was overruled, and the same objection being made, the petition heard. See *ante*, 379.

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The *trustees* were *Gahagan, Stone, and Fauntleroy*; the executors were *Gahagan, Plaistow, and Fauntleroy*. The insertion, therefore, of this allegation conveyed the erroneous impression that the relation of banker and customer existed between the defendants and the petitioners, as trustees, when no such relation did exist; when there was no employment, and no privity between them, unless by legal operation it is to be implied from the misconduct of *Fauntleroy*.

The case also states, that “ *the money raised by the transfers was not carried to the executors’ account.*”

This statement ought not to have been made. It was inserted to convey the idea that there was an account to which the money ought to have been applied; but the account of trustees of a particular sum under a will could not have anything to do with the executors’ account with their bankers.

The insertion, therefore, of this allegation conveyed an erroneous idea, of some negligence in the money not having been carried to an account to which it was inapplicable.

Omissions. Such are insertions of what ought to have been omitted, but there are also omissions of what ought to have been inserted.

The printed report does not contain the whole of the special case. (a) It does not state that a book was kept

(a) The following is a copy of books of the Governor and Company of the Bank of England, in the real case :

On the 26th day of May 1819, the name of the plaintiffs, jointly there was standing in the with *Henry Fauntleroy*, deceased,

at the banking house called "the House Book," in which entries were from time to time made by *Fauntleroy*,

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the sum of 17,061*l.* 12*s.* 4*d.* in the capital stock of navy five per cent. annuities, which were held by the plaintiffs and the said *Henry Fauntleroy*, as trustees under the will of Sir *Thomas Berners Plaistow*, deceased.

The defendants and the said *Henry Fauntleroy* and Sir *James Sibbald*, bart., until the death of the said Sir *James Sibbald*, and the said defendants and *Henry Fauntleroy* since the death of the said Sir *James Sibbald*, carried on the business of bankers in Berners-street, under the firm of *Marsh and Co.*

On the 25th of May 1819, instructions were given by the house of *Marsh and Co.* to their broker *John Henry Spurling*, to sell as much of the said stock as would produce 16,000*l.* sterling, previously to which time there had been lodged at the Bank of England a letter of attorney, purporting to be executed by the plaintiffs and *Henry Fauntleroy*, to sell, assign, and transfer all or any part of 16,000*l.*, part of the said annuities; which letter of attorney was executed by the said *Henry Fauntleroy*, but the execution thereof by the said plaintiffs was forged by the said *Henry Fauntleroy*.

Pursuant to such instructions, the said *John Henry Spurling* en-

tered into contracts with various stock-jobbers for the sale to them of 15,811*l.* 13*s.* of the said navy five per cent. annuities, at prices which, upon the whole, yielded 16,019*l.* 15*s.* 4*d.*, the 19*l.* 15*s.* 4*d.* being the amount of the brokerage.

On the 26th of May 1819, the said *John Henry Spurling* caused transfers to be prepared in the books of the Governor and Company of the Bank of England of part of the said annuities, to the amount of 7,000*l.*, to the purchasers thereof, or their nominees, and on that day the defendant, *Josias Henry Stracey*, attended at the bank and signed the demand to act indorsed on the said power of attorney, and then executed two several instruments of transfer so prepared in the books kept at the Bank of England, of two sums, part of the said annuities, viz. 6,895*l.* 10*s.* 6*d.* to the Rev. *William Yates* and *T. Norris*, Esq., and 104*l.* 9*s.* 6*d.* to one *Henry Neil*; and the said annuities were thereupon carried by the said Governor and Company to the credit of the said transferees in the books kept at the Bank of England for transfer thereof, and the plaintiffs and said *Henry Fauntleroy* ceased to have credit for the same in the said books kept at the Bank.

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and by some of the defendants; that this book purported to contain the transactions of the defendants' house with

On the 28th day of May 1819, the said *John Henry Spurling* caused transfers to be prepared in the books of the Governor and Company of the Bank of England of the sum of 8,811*l.* 15*s.*, residue of the said annuities so sold as aforesaid, in various sums to the purchasers thereof or their nominees, and on that day the defendant *Graham* attended at the bank, and executed four several instruments of transfer in the books kept at the Bank of England, of the following sums, part of the said annuities; that is to say, 5,000*l.*, part of the said annuities, to one *Joseph Seaton Aspden*; 811*l.* 15*s.*, other part thereof, to one *John Brett*; 2,000*l.*, other part thereof, to one *David Gibson*; and 1,000*l.*, other part thereof, to one *Thomas Courtenay*; and the said annuities were thereupon carried by the said Governor and Company to the credit of the said transferees in the books kept at the Bank of England for transfer thereof, and the plaintiffs and said *Henry Fauntleroy* ceased to have credit for the same in the said books kept at the Bank.

The defendants' house had an account with Messrs. *Martin, Stone* and Co., bankers in the city, in the usual way of a banker's account, and a pass-

book went from one house to the other from time to time, according to the usual practice between bankers and their customers, and to this account *Spurling* the broker usually paid the money received by him for stock sold by the order of the defendants' house.

The consideration money of the said annuities was received by the said *John Henry Spurling*, and was paid by him to said Messrs. *Martin, Stone* and Co. to the credit of the house of *Marsh* and Co., according to the usual practice, in the following sums, viz. 7,105*l.* on the 26th May 1819, and the further sum of 8,904*l.* 17*s.* 8*d.* on the 28th May 1819, being the said principal sum of 16,000*l.*, together with the sum of 9*l.* 17*s.* 8*d.*, one moiety of the broker's commission, which was allowed by him to the said house of *Marsh* and Co., according to the usual practice on sales effected by him on their account, since which payment the account of *Marsh* and Co. with *Martin* and Co. had been frequently balanced before the bankruptcy. *Henry Fauntleroy* was permitted by the partners to conduct the greater part of the business of the house without their interference, and drew upon the account of *Martin*,

Martin and Co., and the items ought to have corresponded with the pass-book, which was solely under the

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Stone and Co. in the partnership firm as he thought fit, without the knowledge and in fraud of his partners, more than the amount of the said sums so paid in.

A book was kept at the defendants' banking-house, called the house-book, in which entries were from time to time made by *Fauntleroy*, and by some of the defendants. Many entries were made in it by the defendant *Graham*, by the direction of *Fauntleroy*, or of some clerk in the defendants' house. This book purported to contain the transactions of the defendants' house with *Martin, Stone* and Co. and the sums ought to have corresponded with those in the pass-book. The pass-book was never examined by either of the defendants before the bankruptcy. Upon comparing the two books after the bankruptcy, it was found that neither of the sums before mentioned to have been paid by *Spurling* to *Martin, Stone* and Co., was entered in the house-book or any other book, except the pass-book; but the said sum of 9*l.* 17*s.* 8*d.*, the moiety of the commission, was entered in the house-book in the handwriting of *Fauntleroy*. Upon such comparison of the two books it also appeared that sums

to a very large amount were entered on each side of the pass-book, at various dates subsequent to March 1819, which were not in the house book, and also that sums to a very large amount were entered in the house-book as paid to *Martin, Stone* and Co., which had never been paid to them. These latter entries were in the handwriting of *Fauntleroy*.

Upon the apprehension of the bankruptcy, a paper was found in his private desk, whereof he kept the key, in the handwriting of the defendant *Graham*, in pencil, of which the following is a copy :

" 26th May 1819. 15,000*l.* odd, navy five*s.* 7,105*l.* paid into *Martin's* on the 26th, and on the 28th, 8,900*l.* odd, to make up the account to raise 16,000*l.* money of *H. F. Gahagan* and *Stone*."

There was no account with the defendants' house in the names of the plaintiffs and *Fauntleroy*, but there was an account in the name of the executors of Sir *Thomas Berners Plestow*; the executors were, in fact, the plaintiff *Gahagan*, Miss *Plestow*, and *Fauntleroy*. The defendant *Stracey* knew that the plaintiff *Stone* was in India in the year 1819. The money

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controul of *Fauntleroy*, and which, until the bankruptcy, was never examined by either of the defendants, and when examined it appeared that neither of the sums said to have been paid by *Spurling* and Co. were entered in the house-book. The only entry being 9*l.* 17*s.* 8*d.*, the moiety of the commission due to *Spurling*, which was entered by *Fauntleroy*. This, however, is not the only fraud that has been discovered by this examination; for large sums are entered on each side of the pass-book, which were never entered in the house-book, and large sums were entered in the house-book as paid, of which there was not the payment of a farthing.

Imaginary
 case.

These omissions and insertions are not, however, the only modes by which the defendants have been prejudiced.

By the order of the Lord Chancellor no objection was to be taken on the trial of the issue, on the ground that *Fauntleroy* was interested as a trustee jointly with the plaintiffs, and also a partner with the defendants. The object of this direction was merely to prevent the plaintiffs' being defeated at *Nisi Prius*, by the formal objection that one of the plaintiffs on the record was also one of the defendants. Instead, however, of its having been confined to this object, the fact of *Fauntleroy* being both a claimant and respondent, and the legal consequences resulting from that fact, have been disregarded, and the whole reasoning has been rather upon a speculative than the real case.

raised by the transfers was not carried to the executors' account. *Henry Spurling* to the house of *Marsh* and Co., in the usual

A broker's note of the sale was transmitted by the said *John* course.

In addition to the prejudices arising from these causes, the mode of pleading by a feigned issue, instead of a declaration in *indebitatus assumpsit*, has been injurious to the defendants' interest. In a regular declaration there is a statement that the debt is either for goods sold and delivered, or for money had and received, or for some other particular consideration; but the declaration upon a wager is so general that the defendant has not the least intimation of what is alleged to be the foundation of the debt, or in what legal shape it is supposed to arise. As, however, this debt could not be proveable under the commission, unless it was for money had and received, we shall assume that this was the nature of the petitioner's claim.

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Feigned Issue.

In addition to these prejudices to the defendants, from the form of the case and of the pleadings, the direction to the jury did not meet the case.

Charge at Nisi
Prius.

There were two points of view in which the case might have been submitted to the jury: 1st, assuming it to be a valid instrument; and 2dly, assuming it to be invalid. The judge, instead of stating these two views, excluded from the consideration of the jury all the facts connected with the forgery, and confined them to the supposition that the transfer was valid. His Lordship's charge was as follows:—"The question has arisen out of the forgery of this power of attorney; but the only way that this question can be put to you is, to assume that the power is valid, and then see whether or not the defendants are answerable for this sum of money." And, in this single point of view, the opinion of the jury was taken, instead of its having been taken on both views; *first*, assuming it to be a valid instrument; and, *secondly*, supposing the instrument to be altogether void as a forgery.

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NO RIGHT OF ACTION.

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NO RIGHT OF
ACTION.

Plaintiffs not
injured.

There is no right of action, because the plaintiffs are not the parties injured; and because, even if they were the parties injured, they did not prosecute or give evidence against the felon.

First, the plaintiffs were not injured. The parties injured are not the Bank of England, for they have not paid; nor are they the plaintiffs, the proprietors of the stock, for their stock remains unaltered, and they have not paid a farthing; but the person injured is the purchaser of the supposed stock, by having parted with his money upon a bad security.

That the stock of the plaintiffs remains unaltered is clear upon principle and upon authority.

Principle that
stock unaltered

The security of property, *in general*, depends upon the impossibility of its being transferred by fraud and forgery, as the right to property transferrable only by written documents cannot be transferred by any felon assuming the character of the proprietor.

The law, and the principle of the law upon this subject, as stated by the Lord Chief Justice, in *Davis v. The Bank of England*, 2 Bing. 402, is clear and unanswerable. (a)

Unless, therefore, there is any difference between stock and every other species of property; unless we hold our interests in funded property by a more frail tenure than any other species of property; unless we may by forgery be deprived of this species of property, the right of the

(a) See *postea*, 336.

plaintiffs to their stock is not affected by the forgery of *Fauntleroy*. But the legislature has not been so inattentive to the interest of stockholders; for it has declared (a), "that the said capital or joint stock, or any share or interest therein, and the proportional annuity attending the same, shall be assignable and transferrable as this act directs, and not otherwise; and that there shall be constantly kept, at all reasonable times, in the office of the said chief accountant for the time being within the city of London, a book or books, wherein all assignments or transfers of the said stock, or any part thereof, and the proportional annuity attending the same, at the rate aforesaid, shall be entered and registered, which entries shall be conceived in proper words for that purpose, and shall be signed by the parties making such assignments or transfers; or if such party be absent, by his, her, or their attorney thereunto lawfully authorized, by writing under his, her, or their hands and seals, to be attested by two or more credible witnesses; and that the person or persons to whom such transfers shall be made, do underwrite his, her, or their acceptance thereof; and that no other method of assigning or transferring the said stock and annuities attending the same, or any part thereof, or any interest therein, shall be good or available in law." Such is the security with which the legislature has protected the funded proprietor, whose security consists in the impossibility of its being transferred, except upon due compliance with the act of parliament.

The plaintiffs, therefore, continue in principle the proprietors of this stock; and this doctrine, so clear in principle, is established by authority.

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(a) 1 Geo. st. 9 & 11.

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Authority that
stock is unal-
tered.

It is settled in *Davis v. The Bank of England*, 2 Bing. 404. In this case the Lord Chief Justice says: "I take it to be clear that a transfer in writing, not made by the party transferring, or some agent duly authorized, can have no effect. A forged indorsement on a bill of exchange conveys no interest in such bill. Transferrable shares of the stock of any company cannot be divested out of the proprietors by any act of the company, without the authority of the stockholders. The Bank of England has no more authority to affect the interest of any stockholder, than the most insignificant chartered company has to dispose of the shares of any of the members of such a company. The legislature (so far from allowing any act of the bank to deprive the stockholder of his interest,) has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal. In many, if not in all the loan acts, the mode of transferring is described in the following words: "There shall be kept in the office of the accomptant in London, books wherein transfers of stock shall be entered, which entries shall *be signed by the parties making such transfers*, or by their attorneys authorized by writing under their hands and seals, and attested by two witnesses; and the persons to *whom* such transfers are made, shall underwrite their acceptance, *and no other method of transferring stock shall be good.*" In *Auriol v. Smith* (a), the Lord Chancellor says: "Where the question is whether a *transfer* purporting to be the handwriting of an individual is genuine, the books themselves must be produced. Why? That the party supposed to have made the transfer might shew that it was not his handwriting. If a stockholder is permitted

(a) 18 Ves. 206.

to shew that a transfer purporting to be made by himself is not his writing, he must be permitted to shew that when a transfer is made by attorney, the pretended attorney had no authority, the power under which he claimed to act being a forgery. We cannot do justice to this plaintiff unless we hold that the stocks are still his."

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When this question was last before the Court it was supposed by the counsel for the petitioners that the case had been overruled in the Court of King's Bench. It was so supposed from the general knowledge in the profession, that the decision had been reversed, without any particular knowledge of the grounds of the reversal, as the report had not then been printed; but it now turns out that the supposition was erroneous, for by the report, in 5 *B. & C.* 185, it appears that the reversal was not upon the merits, but upon a point of form. (a) As it never entered the minds of the counsel that the Bank of England had got rid of a question of this importance upon a point of form, it was taken for granted, hastily, as it turns out, that the decision had been reversed upon the merits.

(a) The judgment is as follows: that the bank ever had received the dividends from government; " We can only decide upon the facts stated in the record. The second and fourth counts of the declaration, upon which the Court of Common Pleas have given judgment in favour of the defendant in error, represent the duty of the bank to be to pay the dividends. Now it could not be the duty of the bank to pay the dividends, until they had received them from government. There is no allegation in the declaration

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The LORD CHANCELLOR : —

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Am I right in supposing that the Court of King's Bench abstained from expressing any opinion upon this question?

Mr. Serjeant *Wilde* : —

The Court cautiously abstained from it: not one word passed impugning the doctrine of *Davis v. The Bank of England*, and in a late case the Court of Common Pleas has expressed its continued approbation of the law as established in the case of *Davis v. The Bank of England*, (in *Hume v. Bolland*, 1 *Ryan & Moody*, 371.) (a) We shall, therefore assume that the stock of the petitioners remains as it existed before this forgery, by which the supposed purchaser was defrauded, was committed.

The person injured, therefore, at the time of the bankruptcy was not the proprietor of the stock, or the Bank of England, but the purchaser of the stock, who had parted with his money upon a bad security. He is the person who was injured; he, if any person, had the legal right either to maintain an action or to prove under the commission. If he had said before the bankruptcy, "I have discovered that I have paid my money on a

(a) The Lord Chief Justice *Best*, in alluding to the reversal of *Davis v. the Bank of England*, said, "It is not necessary to consider in this case what may be the effect of a transfer under a forged power of attorney, or the right to the stock transferred. If it were, I should certainly act on the recent decision in this Court. This Court has determined that such a transfer is entirely void, and makes no alteration in the property of the stock transferred; and after what has recently passed it may be proper to state, that there is no disposition in any of the judges who decided that case to recede from their opinion."

forgery, and you have received the money; I call upon you, therefore, to refund it." How, putting the felony out of the question, could this have been resisted? Suppose, upon the same principle, he had applied to prove his debt under the commission, what objection could have been made? The only question would have been, whether the proof ought to be against the joint or the separate estate? Unless, therefore, the plaintiffs and purchasers were both injured, or the purchasers might transfer and have transferred their rights to the plaintiffs, there was no right of action, and consequently no right of proof in the plaintiffs.

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But supposing that the plaintiffs were the parties injured, they could not maintain any action, as they did not prosecute or give evidence against the felon.

Felony.

Where a proprietor is deprived by felony of his property, he cannot maintain any action where the felon is a sole or joint defendant, unless the felon has been convicted upon his prosecution or evidence. By conviction of felony all the felon's personal estate, including the property obtained by the felony, is forfeited to the crown, without any claim to restitution, except upon this condition; *Co. Litt.* lib. iii. c. 13. s. 74. (a); and *Stamford's Pleas of the Crown*, title Forfeiture; and *Hawkins' Pleas of the Crown*, b. ii. s. 9. p. 450. (b) The same has

(a) For such of these crimes he shall forfeit his goods and chattels for which any shall have this judgment, to be hanged by the neck till he be dead, he shall forfeit all his lands in fee simple, and his goods and chattels; for felony by chance-medley, or *se defendendo*, or petite larceny,

(b) "All things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right,

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been stated in a recent case in the Court of King's Bench, *Bullock v. Dods*, 2 B. & A. 275 (a); and the

and not as executor or administrator to another, are liable to such forfeiture."

(a) An attainted person is considered in law as one *civiliter mortuus*. He may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but because if a gift be made to him, the donor cannot make his own act void, and reclaim his gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest. The learned counsel for the plaintiff did not deny this as to lands and corporeal chattels and debts by obligation, but contended that the word *catalla*, in the statute 17 Edw. 2. c. 12, must be understood of corporeal chattels only, and debts by obligation, and had not been carried farther down to the time of Elizabeth; and that the subsequent cases, in which it had been decided, that choses in action, or debts by simple contract, were forfeited for felony or outlawry, were not warranted by law. And in support of this, the opinion of the two justices, in the 9 Eliz., *Dyer*, 263, and some older authorities in the year books, were quoted and relied on, in which that opinion

was entertained, upon the technical reason that the debtor would be thereby ousted of his law wager. These authorities are all referred to in support of the second objection, taken in *Slade's case*, 4 Co. 93; but the objection did not conclude from them, that the felon or outlaw should have the debt, but that the debtor, by the judgment of the law, should be rather discharged of his debt than lose the benefit of his law-wager. And therefore, supposing these opinions to be correct, they would not enable the plaintiff to maintain this action, but would rather shew, that in judgment of law the defendant was wholly discharged, and answerable to nobody. At the conclusion, however, of the report of *Slade's case*, it will be found that those authorities were not acknowledged, and the better opinions in other books there referred to are mentioned: the uniform practice and a late decision of the Court of Exchequer are also mentioned; and from that time to the present, debts upon simple contract have been constantly seized into the King's hands upon outlawry. Indeed the words *bona et catalla*, jointly or separately in our ancient statutes and law writers, denote personal property of every kind as distinguished from real.

same doctrine is repeated in the very case of *Stone v. Marsh*, 6 B. & C. 564, in which the Lord Chief Justice says: "A man shall not be allowed to make a felony the foundation of a civil action; he shall not sue the felon; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own shewing, to be founded on the felony of the defendant.

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Although property which has been obtained by felony is thus forfeited to the Crown, there are three modes by which the proprietor may obtain restitution:

- 1st, By appeal of felony;
- 2d, By statute of restitution;
- 3d, By course of common law.

But there is one condition common to them all; they all and each depend upon the condition, that the proprietor shall, in the first instance, discharge his duty to the public by prosecuting or assisting in the prosecution of the felon. The law will not hear any excuse for non-prosecution, but has solemnly determined that no claim to restitution shall exist, unless it originate in the prosecution of the felon for the very property claimed. The principle of this law ought not, in this place, and the law cannot, in any place, be doubted.

The principle is clear. A member of the community forfeits his right to property when he violates the right on which his privilege depends; and, although it may appear to be a hardship that this rule should extend to the property taken, it is nothing but appearance, for the

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restitution of this property would encourage crime by preventing prosecution. (a)

The temptations to individuals to prefer their own to the interest of the community are so great that the law of England, and of all civilized states, has interposed every check to prevent it. The law of England has said it is criminal, and has termed it, in certain cases, "theft-bote" (b); but it has, in all cases, said that the property is forfeited, unless the proprietor discharge his

(a) The principle of the law is thus stated by Sir *W. Blackstone*, 2 Comm. 289: "The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If, therefore, a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many

cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides."

(b) 4 Comm. 133. The offence of theft-bote is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law "*latroni eum similem habuit, qui furtum celare vellet, et occulte sine iudice compositionem ejus admittere.*" By statute 25 Geo. 2. c. 36, even to advertise a reward for the return

duty to the public by prosecution, without sheltering himself under the prosecution of another, or prosecuting only for part of the property which he claims. Against all these contrivances the law is imperative and absolute. Nay, it is supposed to extend to the property of third persons, obtained not by felony, but by bailment to the felon. Into this discussion, however, to us irrelevant, we do not enter, except to elucidate the principle of the law (a); a principle of the same nature as the principle by which courts of equity will not hear any excuse but the sanction of the court for the purchase by trustees of trust property. (b) The rule therefore

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of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

(a) The vigilance of the law in these cases is thus stated in *Dalton*: "If a man be indicted for the felonious stealing of another man's goods, when in truth those goods be his own, and the goods be brought into the Court (as a manœuvre against him), and he is asked by the Court whose those goods be, and he doth disclaim to have any property in them; by this disclaimer he shall lose the goods, though they were his owne; and though he be acquit of the felony, yet the goods by this disclaimer shall be confiscate to the King. *Fitz. Coron.* 355 & 368.

"So if goods be found in the possession of a felon which he doth disavow, and after he is attainted for stealing of other goods, but not of those, in this

case the goods which he did disavow shall be confiscate to the King; but if he had been attainted for the stealing of those goods, they should have been termed goods forfeit, and not confiscate. *Fitz. Forf.* 24. And in *Bullock v. Dodds*, 2 B. & A. 258, it extends to every species of property. *Per. Cur.* By attainder all the personal property, and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found.

(b) This rule is thus stated by Lord Eldon in *ex parte Bennet*, 10 Vesey, 385: "The ground is, that though in the particular case there may be the most satisfactory evidence that the transaction amounts to no more than that the general interests of justice require that the solicitor is not to be permitted to buy for

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is, in cases of felony, "No prosecution, no restitution." The rule may operate, like all rules, with hardship in particular cases; but it is a wholesome rigour in the main. Be this, however, as it may, it is the law, as will appear by separately considering the three different cases of appeal, of the statute of restitution, and of the course of the common law.

APPEAL.

By appeal there is no restitution, unless the felon is convicted upon the prosecution or evidence of the claimant (*Hale's P. C.* 539, 540) (a); and this, notwithstanding he has already been convicted upon the prosecution of another person. (b)

Such is the law, the principle of which is obvious. The law, in all cases, encourages not the dormant but

himself or for another, as in several cases the powers of the Court would not be equal to protect it against deception, from the impossibility of knowing the truth in every case. That, in truth, is the principle on which Courts of equity have held that trustees shall not buy. I mention it, as Lord *Rosslyn* said more than once, that to affect the sale the trustees must make an advantage. That is not my opinion. The principle is deeper; viz. that if a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise."

(a) If A. steals the goods of B., C., and D. severally, and B. brings his appeal and convicts the offender, yet before judgment C. and

D. may pursue their appeals, and he shall be arraigned also upon their several appeals. 4 E. 411 a. *Hale's, P. C.* 539.

So if judgment be given against A. upon the appeal of B., yet if the appeal of C. were begun before the attainder, A. shall be arraigned upon the appeal of C., because he is to have the restitution of his goods thereby. It seems the attainder is no bar to C.: but certain it is, that if A. be attainted at the suit of B., and then, and not before, C. commences his appeal, A. shall not be arraigned thereupon.

(b) If A. steals severally the goods of B. and C., and he be convict upon the appeal of B., yet C. shall not have restitution till he be convict at his suit also. 4 E. 411.

the vigilant; and this encouragement is of peculiar moment in the cases of prosecution, or no prosecution, for felony. The law, therefore, will not permit a proprietor, who is inactive in the discharge of his public duties, to claim restitution of his property; nor will it permit him to mislead the Crown in its exercise of mercy, by not manifesting the extent of the offender's guilt.

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Nay, the law will not, upon the same principle, permit a prosecutor to conviction to claim more goods than he has specified in the indictment. This is stated by different authors, whose statements are compressed by *Dalton*, page 34. (a)

Upon the same principle, the law will not permit the proprietor to say that it was impossible for him to prosecute, unless he has manifested his vigilance, by some overt act (b), to convict the offender. (c)

(a) If a man doe steale divers goods, and the owner of the goods doth bring his appeale of robbery against the felon, and therein doth omit or leave out any part of his said goods that were stolne, in this case the king shall have all those goods which were left out of the appeale; and the reason of law is, for that by this omission or leaving out any of the goods the felon may escape, and the appellant shall be thus punished by the losse of of his goods for such his negligence, connivencie, and concealing of the felon's offence, and then, in as much as the owner cannot have those goods, the king shall have them as confiscate, according to the old rule,

quod non capit Christus, capit fiscus.

(b) "If a man steal goods" (says *Dalton*, 81), "and before his attainer kill himself, he forfeits to the king not only his goods, but the goods stolen; for the owner not having prosecuted either by appeal or indictment, can neither have restitution of goods by the common law, nor by the statute."

(c) In cases of impossibility of such conviction, it is sufficient that he used his endeavour, as if he takes the felon and imprisons him, and he dies within the year and before the appeal commenced; so if the party abjures or breaks prison after he is taken. *Hale's P C.* 540.

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The law is the same with respect to the statute of restitution. By common law there was no restitution of goods upon an indictment; it could be obtained only by an appeal of robbery. (4 P. C. 355). But, says Sir *W. Blackstone*, it being considered that the party prosecuting the offender by indictment deserves to the full as much encouragement as he who prosecutes by appeal, the statute of restitution was made; which statute enacts as follows: — “ If any felon or felons hereafter do rob or take away any money, goods, or chattels from any of the king’s subjects, from their person, or otherwise within this realm, and thereof the said felon or felons be indicted, and after arraigned of the same felony, and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other, by their procurement, that then the party so robbed, or owner, shall be restored to his said money, goods, or chattels.”

The words of this statute are so clear, that we shall merely add one observation by Sir *M. Hale*, who says: *A.* and *B.* have their several goods stolen by *C.*; *A.* prefers his bill of indictment for his goods; *C.* is thereupon convicted; notwithstanding that conviction *B.* may prefer his bill, and *C.* shall be thereupon arraigned and tried, to the end that *B.* may have his restitution, which he could not have by the conviction upon the indictment of *A.*, because a distinct felony, though most usually at the same sessions the several indictments against the same person are tried by the same jury. (*Hales*, P. C. 545.)

ACTION.

The law is the same in an action, (*Markham v. Cobb*, *Noy*. 82,) where the Court held the plea in bar perfect, because it does not shew that the plaintiff had given

evidence for the conviction, for otherwise he shall not have restitution; and an allegation of procurement is not sufficient. *Et ea de causa* judgment was given for the plaintiff; which law is recognized by Sir *M. Hale*, P. C. 546. (a)

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Such is the clear, ancient, settled law: which, attentive to the public interest, will not, when there have been various offences, leave the punishment of guilt to the chance of prosecution by one of several parties injured, where each, instead of finding an excuse for inactivity, and trusting to another's prosecution, ought to be active in discharging his duty to the public, not only that public vengeance may be satisfied, but that the Crown may not be misled in the exercising or withholding mercy. The law, therefore, has not contented itself with knowing that public vengeance has been satisfied, but insists, as a foundation for restitution, upon individual exertion.

Now, as it is admitted in the present case that the felon was not convicted upon the prosecution or evidence of the petitioners, it would seem to follow, as a matter of course, that the petitioners are not entitled to any restitution; and so it was supposed until the decision in *Stone v. Marsh*. It becomes necessary, therefore, to examine how this ancient settled law is considered in the case of *Stone v. Marsh*: and as this is an appeal from the decision in the case of *Stone v. Marsh*, we may,

(a) But if the plaintiff had not given evidence upon the conviction it was held that the action lay not, but the goods were confiscate to the king, and for want of that averment, in the case of *Markham*, judgment was given for the defendant in trespass. *Hale's P. C.* 546, 7.

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without impropriety, examine the arguments and the reasoning upon which that decision is founded.

And first, as to the maxim cited by the counsel, which seems to have influenced the Court, "*Cessante ratione, cessat et ipsa lex.*"

The counsel said it is an incorrect expression to say, that a debt or trespass is merged in a felony. The felon cannot be sued for the debt or trespass for a time, but the right of action is not gone for ever. The rule, that a party injured by a felonious act cannot sue the felon, is founded on principles of public policy. The object of it is to secure the punishment of offenders; but if the offender is dead or has been brought to trial, the case does not fall within the reasons on which the rule is founded, and then the maxim applies, *cessante ratione, cessat et ipsa lex.* The civil remedy against the felon is only suspended until the party has been tried for the felony. When that has taken place, and he has been either acquitted or convicted, an action for the civil injury resulting from his wrongful act is maintainable.

Cause continues.

The assertion that the cause of the law has ceased, is founded upon the supposition that the object of the law is merely the gratification of public vengeance. This is an erroneous supposition; the real object being to secure the exertions of individuals that offenders may not escape conviction, and that, when convicted, mercy may not either be excluded from them by rumours of crime which cannot be established, or be extended to them when they have committed crimes which ought to be punished. This cause of the law, unfortunately, is so far from having ceased, that the present times abound with

forgeries which escape unpunished, from the indulgence by individuals of their own morbid feelings, or by making terms, that is, in other words, by compounding the felonies, with the friends of the offenders. Nor is this confined to forgeries. It is notorious, that thefts are compounded to a large amount; that goods are stolen systematically, not in trifling thefts, but to a large amount; the property is no sooner stolen than the felon, with the plunder in his pocket, negotiates with the party whom he has robbed; they share it between them: the proprietor gets what he can, and wholly disregards his public duties; and the felon, having escaped with impunity, is liberated to renew his depredations; and then we are told that "*cessante causa, cessat et ipsa lex*," as a reason for shaking the foundation of the common and statute law as established for centuries.

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But even if the cause had ceased, the construction of this maxim does not warrant a repeal of existing law. For instance, many of the causes of our law, particularly of real property, which originated in the feudal tenures, have long since ceased; but is any Court to say that all the law of real property ceases. *Cessante causa, cessat et ipsa lex*. The causes of the laws of usury may have ceased; are the courts of law, therefore, or the legislature, to repeal the statutes? Within the last ten years, upon an appeal of murder in the Court of King's Bench, the defendant insisted upon his right to a trial by battle, "to fight with batons after the usual oaths against amulets and sorcery." The counsel for the plaintiff represented to the Court that the law was obsolete; that it was ludicrous in the present times to insist upon this absurdity as law, *cessante causa, cessat et ipsa lex*; but Lord *Ellenborough* said, "it is the law, and must be obeyed." His lordship's words are

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thus reported, in *Ashford v. Thornton*, 1 B. & A. 460. "The general law of the land is in favour of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgment for it." The appeal failed, and this suit by battle was abolished by parliament. (a)

Assuming, therefore, what we deny, that in the present times the cause has ceased; that the law is obsolete; it is not for the courts of law but for the legislature to interpose.

Meaning of
the maxim.

The construction of the maxim "*cessante causâ, cessat et ipsa lex*," has never been supposed to warrant the courts of law in repealing established law, because the principle in which it originated may be supposed to have become obsolete. This maxim, therefore, has never been applied to the repeal of established law; but to prevent the extension of a law to a case not established (b) and not within the principle of the law. If I except all my trees which grow out of any

(a) Statute, 59 G. 3. c. 46.

(b) It is, says Sir Wm. Blackstone, an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now be-

come a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one; not to legislate, but to interpret the law.

wood, but upon land or pasture there, by the exception of the trees the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for without that, which is excepted, they cannot subsist; but if the lessor fells them, or by the lessee's licence grubs them up, in such case the lessee shall have the soil; for *cessante causa cessat effectus*.

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So too in *Plowden*, 267, "wardship is due to the lord in respect of the imbecility of the person to do knight's service: but when he is made a knight, he is thereby allowed and admitted able to perform knight's service, and then his body ought not to be in ward, because his imbecility ceases "*et cessante causa, cessabit effectus*."

It is, therefore, a mistake to assert, that the maxim *cessante causa* is applicable to the present case, and equally erroneous to say that the right is suspended until the offender has, upon some prosecution or another, been acquitted or convicted. With respect to the authorities cited in support of the plaintiff's claim, it will appear, upon examination, that they have not any reference to their claim, or, if any, that their operation is against the claim.

The case from *Bro. Abr. Trespass*, 415, and *Y. B. 31 H. 6. 15.*, as far as it is any authority, proves that an action cannot be maintained after an acquittal of the felony; but it evidently was decided only upon the form of the pleadings. *Higgins's* case also shews that the action could not be maintained. *Markham v. Cobb* proves nothing in favour of the plaintiff's claim, but much against it: the judgment being as follows: "But by the

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Court, The plea in bar is nought, because it does not shew that the plaintiff had given evidence for the conviction, for otherwise he shall not have restitution; and an allegation of procurement is not sufficient." *Et ea de causa* judgment was given for the plaintiff.

The counsel, after having cited these cases, concludes thus: The judgment of the Court in *Dawkes v. Cave-neath* (a), Lord *Hale's* treatise on the Pleas of the Crown, p. 546, and a dictum of *Buller, J.* in *Master v. Miller* (b), all shew that the rule against maintaining a civil action for an act which amounts to a felony, is founded upon principles of public policy, and does not extend to cases where those principles would not be violated by suffering the action to be maintained; and all those authorities were considered and confirmed in *Crosby v. Leng*. (c) How far the serjeant was justified in supposing that these authorities warrant the position which he has advanced, the authorities themselves will best prove. With respect to *Dawkes v. Caveneath* 1652, *Styles*, 346, the question was, if after the defendant was indicted and found guilty of felony, and burnt in the hand, an action of trespass *quare clausum fregit*, and for carrying away the money, be maintainable by the party who was robbed against the party that robbed him, or no. *Roll, C. J.* If it were before conviction, the action would not lie, for the danger the felon might not be tried; and there is no inconvenience if the action do lie, and since he could not have had his remedy before, he shall not now lose it; and now there is no danger of compounding for the wrong. The rest of the judges agreed with *Roll, C. J.*, and so judgment was given for the plaintiff.

(a) *Styles*, 347.

(b) 4 *T. R.* 332.

(c) 12 *East*, 409.

With respect to the assertion that the cases cited by Sir *M. Hale* warrant, directly or indirectly, the position that a right to restitution can exist without prosecution, it is wholly without foundation, as has been already most fully established.

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And how far the dictum of Mr. *J. Buller* in *Master v. Miller* (a) warrants this assertion, the dictum itself will best prove, which is as follows: "If actual forgery had been committed, the defendant could not be permitted to retain the money: he must not get 900*l.* by the crime of another; but in such a case, I agree it would be difficult to sustain the present or any action for the money 'till something further happened than has yet been done. The law, proceeding on principles of public policy, has wisely said, that where a case amounts to felony you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or *tort*, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice; but whether that rule extends to any case after the defendant is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it."

And as to the last case of *Crosby* and *Leng*, it will be seen that the doctrine, so far from confirming the position advanced, is in direct opposition to it. In *Crosby v. Leng*, the question was, whether the law

(a) 4 *T. R.* 332.

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which deprives a proprietor of his right to property feloniously taken from him, unless he prosecutes to conviction, extended to the case where the proprietor had prosecuted ; and, on that ground, the defendant was acquitted. The Court held that it did not apply.

Lord *Ellenborough* said, " The policy of the law requires, that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence ; and, after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject-matter of a criminal prosecution. Here the defendant having been before tried and acquitted of the felony, the objection founded upon the general policy of the law does not apply. This point has been before decided in the cases of actions brought after a conviction of the defendant for felony : and the only difference which can be suggested between the case of a prior conviction and that of an acquittal is, that the acquittal may have been brought about by the defendant's colluding with the prosecutor : but if the acquittal be shewn either in pleading or by evidence to have been obtained by collusion, it would be put aside, and the objection would still remain. All the mischief, therefore, that could result from extending the same rule to cases of acquittal, which has established the right to sue after a conviction of the felon, is done away by letting the defendant in, to shew that the judgment of acquittal was obtained *per fraudem*."

The judgment of the Court, upon this reasoning, in the case of *Stone* and *Marsh*, is as follows : — There is, indeed, another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, for this he may do, if there has not been a sale in market overt; but that he shall not sue the felon: and it may be admitted that he shall not sue others, together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own shewing, to be founded on the felony of the defendant. *Gibson v. Minet*, 1 H. Bl. 612. This is the whole extent of the rule. The rule is founded on a principle of public policy; and where the public policy ceases to operate, the rule shall cease also. This point is very ably shewn in the argument on the behalf of the plaintiffs. The authorities were quoted, and need not be repeated: and it was shewn, that the familiar phrase, “the action is merged in the felony,” is not at all times and literally true. Now public policy requires that offenders against the law shall be brought to justice; and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony, without suit, and of course cannot be allowed to maintain a suit for such a purpose. But it is not contended that any such policy or rule is applicable to the present case: the offender has suffered the extreme sentence of the law for another offence of the same kind. It does not appear that the plaintiffs had any knowledge of the particular forgery mentioned in this case at such a time as might have enabled them to bring the offender to justice sooner; or

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even if they had been acquainted with the fact of the forgery, that they could, in ignorance of the place of the forgery, and of the means by which the forged instrument was placed in the Bank of England, have instituted a prosecution with success. And it was very properly admitted by the learned counsel for the defendants, that he could not contend that an action might not be maintained after conviction of the felon."

It is submitted, therefore, that the plaintiffs could not maintain any action —

1st. Because they were not injured; and,

2d. Because the felon was not convicted upon their prosecution or evidence.

NO RIGHT OF
 ACTION ON
 CONTRACT.

NOT ACTION ON CONTRACT.

Cases.

But supposing that a right of action exists, it is not an action on a contract. This appears from *Markham v. Cobb*, *Noy*. 8, and *Higgins's case*, *Yelv.* 89, which were actions of trespass; and *Horwood v. Smith*, 2 *Ter. R.* 750. which was trover.

Principle.

It is not, however, only from decided cases that the form of action appears to be only tort, but from the very nature of the distinction between tort and contract. A civil injury is either *ex contractu* or *ex delicto*. The distinctions between actions on tort and on contract are known to express these different injuries, and they are distinctions too long settled to be sacrificed for any imaginary good to result from not adhering to them in any particular case.

But it is said, that although the plaintiff may (a) maintain an action on a tort, he is not compelled to resort to this species of action, but may elect to proceed on a contract. But admitting that, generally speaking, when goods are wrongfully taken and converted into money, or when money is wrongfully taken, the owner may waive the tort and proceed by assumpsit, we submit that this doctrine of election does not apply to this particular case; because the law of election does not apply either to a case where only part of the act can be affirmed, or where the right is founded on disaffirmance, or where the act is not voidable but void.

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Plaintiff may
elect.

The doctrine of election is founded upon the supposition that the plaintiff may wholly affirm or disaffirm the act, and that he cannot affirm one part and disaffirm another; that he must be consistent throughout; that he cannot, to use a common expression, blow hot and cold. *Wilson v. Poulter*, Str. 259 (b), and *Smith*

No election of
part.

(a) The words of Lord Tenterden, in *Stone v. Marsh*, are as follows: "This forgery was a capital felony; and it is, therefore, urged on the part of the defendants, that there has been no valid transfer of the annuities; that the Bank of England is answerable to the plaintiffs for having permitted the transfers to have been made without their authority; and that the buyers are also answerable, as having taken by purchase from persons who had no authority to sell. It is not necessary to say whether the plaintiffs had or had not these

remedies, or either of them, because, generally speaking, where an injured party has different remedies against different persons, he may elect which he will pursue. So that the question is, whether the plaintiffs have the remedy they now seek."

(b) Trover by the assignee of *Poulter*. *Poulter*, on 7th May 1724, became a bankrupt, and a commission issued against him 3d August. 16th June 1724, the bankrupt's wife brought to the defendant 3,082*l.* 3*s.* 11*d.* of the bankrupt's money, and desired the defendant to buy some India

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v. Hodson, 4 *Ter. R.* 211. (a) In the case of a chattel in possession can *A.* say to *C.*, *B.* stole my horse and sold it to you, *C.*; you have paid me the amount; I adopt the receipt of the money, but I do not adopt the sale of the horse? What right has he to the money produced by the sale of the horse, if he does not affirm the sale by *B.* to *C.*? But even suppose that *A.* could say this to *C.*, could he say it to *B.*? Could he say to *B.*, you stole my horse, you have sold it for 100*l.* and received the money; pay me the 100*l.*; I adopt the receipt of the money, but I do not adopt the sale of the horse? What right, we ask, has he to the produce of the sale, if he does not affirm the sale? that is, if he does not admit that *B.* was authorized to sell the horse.

and South Sea bonds with it. On the 16th June and 23d June, with part of the money he bought thirty South Sea and India bonds, and delivered them to the bankrupt's wife. On 2d September 1724, the assignees seized twenty-two of the bonds, part of the bankrupt's estate. The point reserved was, whether the defendant is liable in this action to make satisfaction for the money with which the eight bonds, that did not come to the hands of the assignees, were purchased.

The Court, without hearing any argument on the other side, declared that the seizing part of the bonds was an affirmance of the defendant's act in laying out the money; and that the plaintiff, therefore, could not avow the

act as to part, and disavow it for the rest; so the defendant had judgment.

(a) The bankrupt fraudulently delivered goods to one of his creditors. The assignees proceeded in assumpsit; to which a set-off was pleaded. Sir *V. Gibbs*, then at the bar, said, "The plaintiff has an option either to affirm or disaffirm the contract; if the former, the defendant is entitled to set off his demand;" and so the Court decided. Lord *Kenyon* expressly says, "Although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it, they must act consistently throughout; they cannot, as has been often observed in cases of this kind, blow hot and cold.

Upon the same principle, too, the affirming the receipt of money by an agent affirms the authority upon which the agent acted; and, in general, the confirmation of the result adopts all the previous incidents, and particularly if the result could only follow from the adoption.

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Assuming this to be the general law, the question is, whether there is any difference in the particular case before the Court — whether the proprietor, of stock, which *Fauntleroy* has transferred by forgery, may proceed against *Fauntleroy* for the money, without affirming the forgery — whether the plaintiffs may say, you, *Fauntleroy*, by a forged power of attorney, sold the stock which stood in our names? You received the money; we adopt your receipt of the money; but we do not adopt the sale of the stock.

This was the substance of the reasoning in *Stone v. Marsh*; where the Court said, “ The money so received by the banking-house not having been paid over to the trustees, clearly constitutes a debt due to them. It may be said that the stock was transferred, and the money paid to the defendants, without the authority of the trustees. The purchaser, however, does not object to the conveyance or claim to have his money back; the defendants, therefore, can have no plea for retaining it from the plaintiffs. *Marsh* and Co. assumed to have authority to sell the stock; they sold it, and received the money: the former owners of the stock may adopt their act, and claim the money, for the defendants cannot be permitted to say they had not authority; and the principal has a right to adopt and have the benefit of the acts of a person assuming to have the authority of an agent, at all events as against such

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agent," *Russett v. Thompson* (a), *Lucena v. Crawford* (b),
Hagedorn v. Oliverson. (c)

Such are the authorities in support of this doctrine ; but, by referring to these different cases, it will be seen that, so far from impugning the general doctrine, that part of an act cannot be confirmed without a confirmation of the whole ; they are one and all decided upon this foundation as established law. It is settled in these cases, that an insurance effected without authority may be adopted by the party for whom it is effected ; but it is upon the express ground that it is adopted throughout : that he cannot adopt the insurance without making himself liable for the premium. The very possibility that he might, in one case, evade this liability, being the only cause of any doubt entertained by the Court ; Lord *Ellenborough* saying, in *Hagedorn v. Oliverson*, " The difficulty in this case arises from the situation of *Schrorder*, because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium ; for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly ; because in one event, namely, that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium, in the other event of the ship's arrival, by declaring that he chose to stand his own insurer. But I do not think that consideration governs the case now before us between this plaintiff and the underwriter."

We submit, therefore, that the plaintiffs cannot claim the money produced by the sale of the stock, if they do

(a) 13 *East*, 285.(b) 2 *N. R.* 523.(c) 2 *M. & S.* 485.

not affirm the sale; that they have no right to claim this money unless it is the produce of their stock, disposed of with their assent under this forged power of attorney; that they cannot affirm it in part without affirming it in the whole; and that as they cannot affirm a felony, by bringing an action of assumpsit against the felon, founding itself upon the felony as a lawful act, a species of theft-bote, of compounding felony, which cannot in any case be legalized, the law of election does not apply; and even if, in any case, it could be applicable, the felon cannot confirm his own act, which he must do in the present case, as *Fauntleroy* is one of the individuals to affirm the receipt of the money as one of the trustees.

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BOLLAND.
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But the illegality of confirming a felony is not the only reason against the extension of the law of election to the present case; as, upon the same plea of consistency through the whole transaction, the plaintiffs cannot elect to proceed by contract, when the foundation of his proceedings has been instituted in tort. If I am walking in the street, and an assassin stops and wounds and robs me, the law will sanction me in prosecuting the felon: and, when I have discharged my duty to the community, it will permit me to recover my property in an action commenced in the same spirit, and founded upon the same assertion, that by tort I was deprived of my property. The law expects that I should first appear as a prosecutor, and solemnly swear that I was assaulted and feloniously robbed: and it will then hear any oath consistent with this allegation; but it will not hear me, after having thus sworn in a criminal court, proceed to a civil court, and swear directly the contrary, that I lent the money to the miscreant, and that he faithfully promised to pay it to me when requested so to

No election on
disaffirmance.

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do. Such is the law in general, and in the present case the plaintiff cannot be heard to claim any right, except by saying, the offender who took my property was a felon, and as a felon I have prosecuted or was ready to prosecute him. I have sworn or was ready to swear that he falsely and fraudulently and feloniously took my property.

This clear law was admitted, by the counsel for the assignees, in the argument of the case of *Stone and Marsh*; but their admission was extended beyond their intention, to the injury of the defendants. The Lord Chief Justice is reported to have said: "It was very properly admitted by the learned counsel for the defendants, that he could not contend that an action might not be maintained after conviction of the felon." But the counsel did not admit, nor did he suppose that his admission would be extended to an action on a contract. He did not dispute that, after conviction of a felon, an action might be maintained on a tort — the object and policy of the law being, to restore the property to the proprietor as soon as he has brought the offender to justice. But this admission to this extent has been considered a conclusive admission, that an action on a contract may be maintained, which is, in other words, to make the other side a present of the whole case.

No affirmance
 a void act.

In addition to these reasons, we submit that the doctrine of confirmation does not extend to a void act, to an act which is done after some previous act that is wholly void, but is merely the ratifying and perfecting an existing defective title. This has been long settled. In *Co. Litt.* 295, in the chapter of confirmation, it is stated, "A confirmation doth not strengthen a void estate. *Confirmatio est nulla ubi donum præcedens est invalidum et ubi donatio*

nulla omnino nec valebit confirmatio: for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law." The same doctrine is thus expressed by Lord Chief Baron *Gilbert*. "A confirmation is an approbation of, or assent to an estate already created; by which the confirmer strengthens and gives validity to it as far as it is in his power. It has this operation only with respect to estates voidable or defeasible; but it has no operation upon estates which are absolutely void." Such words may be used in a confirmation as may increase or enlarge the estate; but that, as Lord Chief Baron *Gilbert* observes, is by the force of those words, and strictly speaking is foreign to the confirmation. *Gilbert's Tenures*, 75. The question then is, simply, was this a void act? If the case of *Davis v. The Bank of England* be correct in point of law, it is a void act: the stock of the trustees remains unaltered by this felony of *Fauntleroy*, and the trustees may, of course, go to the bank, and transfer it; but this will be creating a new title after the bankruptcy, and not confirming an inchoate title which existed before the bankruptcy. This would be so far from confirming the old title, that it would stand upon the foundation, that it could not be confirmed; that all which had been previously done was perfectly nugatory; and that the record of the conviction of *Fauntleroy* was not a document to constitute part of the buyer's title. "The fraud of *Fauntleroy*," to use the words of the counsel in *Stone v. Marsh*, "in giving authority to act without the consent of his co-trustees, is no part of their title;" and why not? because it would not be perfecting the old, but creating a new title. It would be perfectly nugatory, even if all which was done had been done by the command of the trustees, as there would not have been that compliance with the statutable directions by which alone

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the stock can be transferred. Is it, therefore, to be more effectual because it has been committed by forgery and felony?

The observations upon this reasoning, as made in the case of *Stone v. Marsh*, are as follow: Lord *Tenterden* is reported to have said: "It was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or a felonious act; and that the plaintiffs were seeking to ratify the felonious act, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was only the inducement to the Bank of England to allow the transfer to be made." (a) With all due respect, we submit that the fallacy is not in the argument but in the answer, which stands upon the foundation that the plaintiffs may affirm the receipt of the money, without affirming the forged power of attorney by which the receipt was obtained. For these reasons, therefore, the doctrine of election does not apply:

1st, Because part of the act is a felony which cannot be confirmed;

2d, Because the right is founded on disaffirmance;

3d, Because a void act cannot be confirmed.

(a) *Stone v. Marsh*, 6 B. & C. 565.

But even supposing that in law it could be confirmed, it has in fact been disaffirmed. In proof of this we refer to the following examinations of the creditors when they tendered their proof.

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Q. Look at the power of attorney, dated 24th May 1819, purporting to be signed by *William Stone*, and state whether that is your signature?

A. It is not signed by me, or by my authority.

Q. When did you first discover that this power was a forgery?

A. A few days after the stoppage of the house in Berners Street. I think on the Tuesday after the stoppage.

Q. Have you received the payment of any dividends from the Bank of England since that time?

A. No, I have not, in respect of this stock.

Q. Has there been any transfer of this stock made to you or your co-trustees?

A. No.

Q. Have you made any application to the Bank of England respecting it?

A. Yes, through my solicitor.

Q. What was that application?

A. To replace the money.

Q. Has it been replaced? and if not, state why not.

A. It has not been replaced; and I refer to a letter from the Bank of England, which is not here, but of which I will furnish a copy.

Q. As, in the deposition on which you propose to prove your debt, you state that you have not any security or satisfaction whatsoever for your debt, do you mean to say that you abandon all claim upon the Bank of England?

A. No, certainly not.

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Q. Have you instituted any criminal proceedings against the person by whom the forgery was committed?

A. No, I have not; but *Henry Fauntleroy* has been convicted of forgery of some other power of attorney, and executed in consequence; but we did not prefer any indictment, although I gave information, and was ready to prosecute, if necessary.

Wm. Stone.

Henry Gahagan, esq. examined.

Q. Look at the power of attorney, dated 24th day of May 1819, now exhibited to the commissioners, and purporting to be signed by *Henry Gahagan*, and state whether that is your signature?

A. Certainly not, nor by my authority.

Henry Gahagan.

Now, when *Stone* was asked, whether “the power of attorney purporting to be signed by *Wm. Stone* was his signature,” according to the argument that has been addressed to the Court of King’s Bench, and to this Court, the answer ought to have been, “No, that is not my signature; but I adopt and affirm it to be a signature by my authority subsequently. “But what is the answer? “It is not signed by me, or by my authority.” This, so far from being an assent, is an express repudiation of the transaction — a refusal to adopt it after the commission. It is a claim to hold the Bank of England liable to that demand to which, for one moment, they could not be liable, consistently with the argument of assent and confirmation.

Not *assumpsit*. For these reasons no action on a contract can be maintained; but, supposing an action on a contract could be maintained, *indebitatus assumpsit* will not lie.

In this action the defendants must be equitably bound to pay the money; but if they are equitably bound, it must either be on account of their having actually received the money, or on account of some legal obligation amounting to an actual receipt.

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But the defendants did not in fact receive the money. *Fauntleroy*, having formed a scheme to cheat an individual by a forged transfer of stock, got the money out of the supposed purchaser's pocket into his own. The purchase money was paid by the broker into *Martin's*, from whom it was drawn out by *Fauntleroy*, and, by false entries, concealed from his partners, to whom he acted as fraudulently as to the purchaser whose money he purloined. *Fauntleroy* meant to stop the money, as he did stop it, at *Martin's*, in the same manner as he might have stopped it in the hands of the broker, or a porter to the house. There was, therefore, no receipt in fact; and consequently the defendant's liability in this action, if it exist, must be on account of some constructive receipt, some legal responsibility, *dehors* the receipt of the money. But supposing such legal responsibility to exist, there will hardly be any disposition in the Court to enforce it against the defendants. The words of Lord *Mansfield*, in the case of *Willett v. Chambers, Cowp.* 815, will be applicable to the situation of the parties under such circumstances: — “ Both parties in this case undoubtedly are innocent; and the loss that will fall upon the defendant, if the law is against him, will be much greater than that which will be sustained by the plaintiff if he fails. It is indeed so hard a case upon the defendant, that every leaning of the Court would be in his favour. But the question is, ‘ Whether, in *point of law*, this engagement with *Dadley* does not make *Chambers* answerable?’ ”

No receipt in fact.

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 BOLLAND.
 In the matter
 of
 MARSH
 and others.
 Not received
 by customer.

If there be any legal responsibility, it must be because there has been a dealing by *Fawcett* with a customer of the house, or with a stranger.

There was no relation of banker and customer between the plaintiffs and defendants. The plaintiffs did not keep any account with the house. Although this case has been considered as if the payments were made on behalf of a customer, it is so far from it, that it is the case of a felon using various persons as his instruments to obtain the property of another, by falsely representing that he has transferred stock for the money advanced. He defrauded his partners and the supposed purchasers of the stock from whom the money was obtained. It is not a commercial transaction, but a transaction of felony : and, admitting the extensive responsibility of partners to their customers, and that a customer who deals with one partner deals with every member of the firm, yet the liability of the firm in this case cannot exist from any such relation, for no such relation existed.

The responsibility, therefore, if it exist, must be on account of the dealing with a stranger to the house.

Stranger.

In the case of a stranger's money, the law is clear. If the debt is proveable as a joint debt, it must be either because, 1st, It was trust property received by the house with knowledge that it was trust property ; or, 2d, Because it was the property of the trustees, paid into and remaining with the house.

Trust property.

With respect to trust property, payment by a trustee who is a member of a firm into the funds of the firm, with the knowledge of the partners that it is trust property, gives to the cestuique trusts a right of election to prove against the joint or separate estate ; but without

such knowledge the debt is separate. *Ex parte Apsey*, (a) 3 Bro. 265. *Ex parte Watson* (b), (1814,) 2 V. & B. 414. *Smith v. Jameson*, 5 T. Rep. 601. Such being the law, the right of proof, on this account, against the joint estate, depends upon a mere question of fact, whether the partners knew that it was trust property, which they clearly did not. And, in a question between two classes of creditors, it must be an actual and not a constructive knowledge, not an assumption, from *Fauntleroy* having thus made them tools in the forgery of the power, that they in law knew what in fact they did not know, that the trust stock was sold, because the directions were given in the name of the house to *Spurling* to sell the stock, and *Stracey* signed the demand to act. The observation made by Lord *Tenterden*, as to the legal consequences of the want of knowledge by the firm, cannot be applicable to this state of the law.

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(a) *Ex parte Apsey*, (1791,) 3 Bro. C.C. 265. *Apsey* and *E. Allen* were assignees of *Tory*; *E. Allen* and *J. Allen* were partners.

E. Allen applied the sum of 432*l.* 17*s.* 6*d.* belonging to *Tory*'s estate to his firm of *E. and J. Allen*. *Apsey* applied to prove this sum.

The Lord Chancellor said, in the latter of these cases the partners had agreed to consolidate the separate debts, which made the difference. Here one, by abusing his trust, advances the money to the partnership: that will not raise a contract between the partnership and the person whose money it is; and refused the petition.

(b) *Mrs. Watson* and *Nelson* were partners. *Mrs. Watson*, with the knowledge of *Nelson*, brought into the partnership funds to which she was entitled as administratrix. The Lord Chancellor said, the administratrix committed a breach of trust by continuing this money in the trade; and the partners, knowing that a certain proportion belonged to the children, who, being infants, could not contract, held this money on the only terms on which they could hold it, as debtors to the children; as if it had been placed with them by way of direct loan.

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Ex parte
 BOLLAND.
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 of
 MARSH
 and others.
 Not in the
 house.
 General.

The only remaining question upon this part of the case is, was the money, in legal construction, in the house at the time of the bankruptcy? We submit that it was not. The words of Lord *Tenterden* are: "The money was so paid generally, and was never appropriated by the house to any particular account; not to the account of *H. Fauntleroy*, as was assumed in one part of the argument for the defendants; nor to the account of the trustees, who had not in fact any account with the house; nor to the account of the executors of the person of whose estate these annuities had formed a part, and who had an account with the house; and therefore, being so paid in, and not placed to any particular account, cannot have been drawn out, but must be taken to have remained in the hands of the house at the time of the bankruptcy." (a) As the payment by a banker of money to a wrong account would be no answer by him to a claim by the right owner, the placing this money, if it ought to have been placed to the account of the trustees, to the account of the executors, or of *H. Fauntleroy*, or of any other stranger, would be no discharge to the bankers. The effect of this observation of Lord *Tenterden* may, as *Fauntleroy* actually drew out the money, be confined to the words used in the beginning and in the conclusion of the passage, and is thus stated, viz. "The money was paid generally, and, not having been drawn out (by *the owner*), must remain in the house."

But if a member of a firm obtain money from a stranger, and pay it into the funds of the house, and

(a) *Stone v. Marsh*, 6 B. & C. 562.

draw it out without the privity of the partners, there is no obligation upon the firm. The question therefore is, had the firm such knowledge of its being trust property as to make them liable? The only evidence of their having had any notice of any sort is their having been credited with a part of the commission; but, as they would have been entitled to this credit merely upon the sale of the stock by their broker, it is, if construed most strictly against the firm, evidence that they knew of the sale of the stock, not that they knew of the receipt of the money to be held by them as bankers. The observation, therefore, upon which the judgment of the Court seems to have been founded, applies to a case which did not exist, as the firm had not notice that the money was to be held by them as bankers. The words of Lord *Tenterden* are: "Supposing all but one to have been ignorant of the facts, (which, however, cannot have been,) no neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the plaintiffs were no parties, can deprive the plaintiffs of their right to their money."

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Assuming, for the sake of argument, that the partners had notice that it was trust property paid into the house; it did not remain in the house so as to make the partners liable in *assumpsit*, because payment has been made to one of the plaintiffs. The plaintiffs are *Gahagan, Stone, and Fauntleroy*, suing for a joint debt due to them, when *Fauntleroy* has received payment. It is an answer to such demand, that payment has been made to one of the three, viz. to *Fauntleroy*. There is no authority to shew that to such an action a plea of payment or tender to one of the plaintiffs is not an answer. There is a well known

Payment to
Fauntleroy.

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professional anecdote stated in the life of *Noy*, by which the direct contrary is recognized as law. (a)

LORD CHANCELLOR :—

Was not some question as to usage, with respect to this, put to the jury ?

For the petition :—

It certainly forms no part of the special case ; but in the report of the trial, in *Ryan* and *Moody*, 368, Lord *Tenterden*, in his charge to the jury, is reported to have said : “ But they say also that *Fauntleroy* was one of the persons entitled, and that he has drawn it out, and therefore they are not answerable. Now if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority ought to be given to that effect to the bankers : that, in my experience, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment

(a) Three graziers at a fair had left their money with their hostess, while they went to the market ; one of them returned, received the money, and absconded ; the other two sued the woman for delivering what she received from the three, before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced ; when Mr. *Noy*, not being employed in the cause, moved, in arrest of judgment, that the defendant had received the money from the three together, and was not to deliver it until the same three demanded it ; that the money was ready to be paid whenever the three men should demand it together. This motion altered the whole proceedings.

has been made to one only of several who are jointly entitled to receive it. If, according to the ordinary course of business, he was not solely entitled to receive this money, then payment to him is no discharge, and you will find your verdict accordingly."

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and others.

Upon this direction it is sufficient to say that there was not any evidence respecting such being the usual mode of dealing; that the counsel were not heard upon it; that the mere knowledge which parties have, or suppose they have, of facts, is not a sufficient foundation for a verdict in this important case; in which it is assumed, without authority, that if a firm of bankers receive money belonging to three, not customers of the house, it cannot be paid to the one by whom it was paid into the house, so as to discharge the receivers in an action of *assumpsit* by the three. That an action might have been maintained against *Marsh* and *Graham*, for negligence, is a different question; but this would not be an action of debt, but an action for damages, which in bankruptcy makes the whole difference; the right to prove, in this case, and the right to maintain *indebitatus assumpsit*, being convertible terms.

We therefore submit that *indebitatus assumpsit* does not lie.

NO RIGHT OF ACTION BEFORE BANKRUPTCY.

But supposing that an action could be maintained, it was not maintainable until after the commission had issued.

A right of action after the bankruptcy does not give any right of proof. This position is too clear to admit of doubt: many of the cases were lamented by the

1828. Judges and Chancellors who decided them (a), but all of them recognize the law. *Bamford v. Burrell*, 2 B. & P. 1.; *Utterson v. Vernon*, 3 T. R. 539.; *Hodgson v. Bell*, 7 T. R. 97.

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Ex parte
 BOLLAND.
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 of
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The question, therefore, is, whether before the bankruptcy a right of action existed; or whether such a right, if any, accrued after the bankruptcy? But there could be no right of action until the conviction of *Faulstich*, which was after the bankruptcy. To meet this, it was said by the counsel in *Stone v. Marsh*: "The civil remedy against the felon is only suspended until the party has been tried for the felony. When that has taken place, and he has been either acquitted or convicted, an action for the civil injury resulting from his wrongful act is maintainable." Of this part of the case, and of this observation by the counsel, no notice was taken by the Court. But if stock payable on demand is not proveable, if no demand be made before the bankruptcy, what right of proof can exist when no right to demand existed till after the bankruptcy?

With respect to the assertion that the right was suspended, it is a mistake of the law. By felony the goods are absolutely forfeit and confiscate to the King; and no right to restitution exists until after a compliance with certain terms, as has been already stated, and as appears in *Horwood v. Smith*, 2 T. R. 750. (b)

(a) *Ex parte Groome*, 1 Atk. 115.; *Ex parte Barker*, 9 Ves. 110.; *Mayor v. Steward*, 4 Burr. 2,440, cited 8 East. 316; *Wyllie v. Wilkes*, 2 Doug. 519; *Utterson v. Vernon*, 3 T. R. 539.; *Cowley v. Dunlop*, 7 T. R. 565.

(b) On the 29th of June 1787, the plaintiff had eighteen sheep stolen; on 6th July 1787, the defendant bought the eighteen sheep in Smithfield market, at a fair price. On the 17th July 1787, the plaintiff gave the de-

There was, therefore, no right of action before the bankruptcy.

For these reasons, therefore, we submit, that there ought to be a new trial: 1st, Because the case was not properly stated: 2d, Because there was no right of action

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defendant notice that the sheep, which he then found in the defendant's possession, had been stolen from him, and he demanded them of the defendant, who refused to deliver them up. *Bateman* stole the sheep. In February 1788 the plaintiff prosecuted and capitally convicted him. In November 1787 the defendant sold the sheep, which were of the value of 18*l.*, because they did not thrive. The defendant had notice of the conviction of *Bateman* on the plaintiff's prosecution before the action brought.

Miles for plaintiff:—The plaintiff's claim to restitution is founded upon the 21 *H. 8. c. 11.*, which directs that stolen goods shall be restored to the owner upon certain conditions; namely, that he shall give or procure evidence against the felon, and that the felon be prosecuted to conviction thereon. Upon performance of these, the right of the owner, which was before suspended, becomes perfect and absolute. Now both these conditions were satisfied in this instance. The only objection which can be raised is, that fresh suit is as necessary to be inquired into, and shewn, under the statute, as at common law; but there is a great difference between the two cases.

Lord *Kenyon*, C. J.:—There is no case in which it has been held that this action can be maintained against a person in this defendant's situation. The plaintiff has a right to restitution of the goods in specie, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction and refusal to deliver them.

Buller, J.:—The plaintiff could not demand the goods of defendant merely because they had been stolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. Now when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property had been altered by a sale in market overt.

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in the petitioners, as they were not injured; and, even if they were, because the felon was not convicted on their prosecution or evidence: 3d, Because there was no right of action on contract, either originally or by election, as the doctrine of election does not apply either to a partial affirmance or to the affirmance of an act which from its nature is founded solely on tort, or to an act which is not voidable, but void; and because the act has been disaffirmed: 4th, Because no action of indebitatus assumpsit will lie, as there was no receipt, in fact, by the partnership; nor was the money, by construction, in the house, so as to charge the firm; and, 5thly, Because there was no right of action before the commission issued.

The *Attorney General*, Mr. Serjeant *Bosanquet*, Mr. *Horne*, Mr. *Bickersteth*, and Mr. *Phillimore*, for the respondents: —

Preliminary.

Although this petition was framed upon the allegation that, since the last judgment, facts had been discovered by which the decision might be impeached; yet the arguments have been confined to a repetition of the same reasons which were adduced in the Court of King's Bench, without any allegation of surprise upon the trial, or any statement to shew that if another trial were directed any new fact could be now stated to the jury; nor has it even been insinuated, that, in the event of a new trial, the case of the petitioners could be strengthened.

We might, therefore, content ourselves with referring to the printed report of the case, and the judgment delivered in the Court of King's Bench, and confirmed in this Court; but there are a few observations which seem

to require explanation. Amongst the various charges of omission and commission imputed to the respondents in the observations made upon the case, which was directed by Lord *Eldon* to be argued, and was decided by the Court of King's Bench, it will be sufficient, referring to the case itself, to advert only to the direction, by the order of the Lord Chancellor, that no objection was to be taken on the trial of the issue, on the ground that *Fauntleroy* was interested as a trustee jointly with the plaintiffs, and also a partner with the defendants. Upon this it has been observed, that this important direction was scarcely noticed in the Court of King's Bench; and that its only object was, to prevent the failure of justice by a formal objection.

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But this direction, so far from having been unnoticed, was brought fully into the view of the Court. Mr. *Pollock* begins his argument in these words: "There is no debt at law due from the banking-house to the trustees. The case may be considered in three ways; first, considering *Fauntleroy* as a trustee, but not a partner in the banking-house; secondly, as a partner, but not a trustee; thirdly, both as a partner and a trustee."

The LORD CHANCELLOR.—The Chief Justice begins his judgment by referring to the order. He says: "Taking no objection on account of the particular situation of *Fauntleroy* as being both a proprietor of the stock sold and a partner in the banking-house, and the case is, therefore, to be considered as a case between the plaintiffs, proprietors of navy five per cent. annuities, on the one part, and the defendants, as a banking-house, on the other part." He seems, therefore, to have considered it as a case between A. B. and C., and D. I do not exactly understand it.

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Mr. Serjeant *Bosanquet*.—It was to prevent any technical objection being taken of his being both plaintiff and defendant. This was one object of the direction; but it was not the only object; for at the time when these subjects were discussed before my Lord *Eldon*, it was contemplated that some question of law would arise, that might defeat the consideration, whether this, although not a legal debt, was not an equitable debt, and of course proveable in bankruptcy. Amongst the various reasons why it may be considered proveable as an equitable debt, it may here be observed how strongly the principle laid down by Lord *Eldon* in *ex parte Harris*, 1 *Rose*, 129, 437, and *ex parte Yonge*, 3 *V. & B.*, 31 & 2 *Rose*, 40, applies to this case, where *Fauntleroy* stood in the situation both of partner and trustee; for in these cases it was determined, that where a partner of two firms applies the property of one to the other, it is proveable as a joint or separate debt, at the election of the firm which has been defrauded; and although this is not the case of partnership, it is stronger, as *Fauntleroy* is a joint proprietor with Messrs. *Stone* and *Gahagan*, and he, by fraud, obtained these funds.

Davis v. Bank
of England.

It has also been said, that the case of *Davis v. The Bank of England* was not noticed in the argument or in the judgment in the Court of King's Bench. So far from this being the case, it was distinctly brought before the Court by Mr. *Pollock*, who made it a material part of his argument. He says, in *Davis v. The Bank of England*: "It was decided by the Court of Common Pleas, that property in stock is not transferred from the owner by being placed under a forged power of attorney to the name of another person in the books of the Bank of England; the plaintiff therefore need not resort to the banking-house. Suppose the money of *A*." Then he

goes to illustrate his position. Suppose the money of *A.* to be drawn out of the hands of his banker *B.* by a forged check, and paid to *C.*, another banker, and then *B.* to become bankrupt, the assignees of *B.*, and not *A.*, will be entitled to the money from *C.* If any person can sue here, it must be the Bank of England. A man cannot adopt a felony."

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It will not be supposed that Mr. *Pollock* stated his argument in the very few lines in which it is condensed in the report; he occupied a considerable portion of time, and the Court, in delivering their judgment, were of opinion that, whatever might be the result of the case, it did not lead to the conclusion he wished to draw from it, and that it was not necessary to decide that point. It is erroneous, therefore, to suppose, either that the Court of King's Bench assumed that the stock had or had not been transferred, or that they had taken no notice of the case of *Davis v. The Bank of England*: the Court, having taken the subject into consideration, declared that it did not affect the subject then before them. It is unnecessary, therefore, for us to enter into a discussion whether the question, which they say in their judgment does not at all bind or does not affect the conclusion, was or not rightly decided.

A few words, however, it may be necessary to add. Stock is a new species of property, a property *sui generis*, for which the Bank are not the debtors, but the Nation. The only title that any person has to his stock is the stock ledger at the Bank, which is the register of the national debt. That property in stock, as between the stockholder and the nation, can be transferred only in a particular way, and that a forged power of attorney

(a) 2 Bing. 393.

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is not a good power of attorney, are points too clear to admit of doubt ; but when it is said that, after a forgery committed, the right of the stockholder is in the same situation in which it was before the forgery — when it is compared to the forgery upon a banker, the assertions are without due consideration of the nature of the property, and without an accurate view of the little analogy which really exists between the two cases thus supposed to be similar.

Effect of the
transfer.

Although the law prescribes that the title to stock shall be transferred only in a certain way, what is the course, when the transfer does actually take place ? The result is, that when the transfer does actually take place, the credit which the individual had with the government, the credit which he had at the bank, is *de facto* displaced. The stock is sold to some other person, who has credit for it, and that credit is again divided, over and over again, perhaps fifty times, and in fifty subdivisions, in the same day ; so that, practically speaking, it may be impossible, at the end of a very small lapse of time, to know what has become of the original stock ; a facility of transfer which it was the object of the legislature to afford. This facility of transfer is one of the peculiar advantages belonging to this species of property ; and this advantage would be entirely destroyed, if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate ; you can look no further, nor is it the practice ever to attempt to look further, than the

Bank books for the title of the person who proposes to transfer to you.

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The assertion, therefore, that the stock belongs to the proprietors just as it was, is wholly unintelligible. That the original proprietor may, if practicable, be entitled to have his original stock replaced, or other stock of the same value, or that the Bank may, for their negligence, be liable in damages to the government, are different questions. The identical stock cannot be replaced: whether other stock can be obtained depends upon circumstances, that is, whether there are persons ready to sell their stock. The Bank cannot create stock, and, by possibility, may not be able to procure it. In these cases there can only be a compensation in damages.

The LORD CHANCELLOR.—Your argument would render it necessary for me to overrule the case of *Davis v. The Bank of England*. I wish, if I can with propriety, to avoid the agitation of this question.

For the respondents.—We have been, perhaps, led into this line of argument, because it was the line of argument addressed to Lord *Eldon*. It was contended that the decision was erroneous, and inconsistent with itself. The Lord Chief Justice begins by saying, that the stock was not transferred (*a*); and then notices that the stock has been transferred, and says the persons into whose names it has been transferred have a right to recover the dividends. Now it is quite impossible there can be a transfer and no transfer in the same transaction.

It was also submitted to Lord *Eldon*, that the Bank could not create stock; that it was possible, although not

(a) *Bing*. 409.

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probable, that stock might not be procured; and to say, therefore, that the parties were in the same situation was a contradiction in terms.

With respect to the felony, the case has been fully argued on former occasions; and we shall confine ourselves to two positions: 1st, that the law does not apply to the present case; and, 2dly, that even if it did the law has been satisfied.

Although centuries ago an action might not have been maintainable for a personal chattel in possession, which had been obtained by felony, until the felon was prosecuted or convicted upon the evidence of the owner; although there might have been a necessity to convict the same offender, upon fifty different indictments, before the right to restitution was confirmed; yet this law was never extended to choses in action; it was founded upon a principle not applicable to the present case; and as the practice of the Court has departed from the ancient mode of proceeding, the Court will not, when the law is satisfied, extend this obsolete law to a new case.

Principle.

The principle upon which the rule is founded cannot be mistaken; it is solely upon the ground that the allowance of a private right may lead to the neglect of a public duty. This was stated by Lord *Ellenborough* in *Crosby v. Leng* (a), and by the Court in the case of *Stone v. Marsh*. (b) This rule, therefore, is not analogous to other rules of law or rules of property, by which the rights of parties are regulated, and the transactions of life guided, and which rules must remain the same, whatever alterations may have been made, either in the

(a) 12 *East*, 409.

(b) 6 *B. & C.* 561.

state of society, or in the reasons which may call for the application of the principle in a particular case. This being the principle, why is it to be applied to a case where no public duty can be neglected? In the present instance, no public policy can be affected by the non-conviction of the offender.

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In addition to this, it is almost unnecessary to state, that a very short time after one offence was discovered the felon was taken up, tried, and executed. These parties themselves gave information, were ready to prosecute, and discharged their duty to the utmost of their power. However lightly, therefore, the petitioners may treat the maxim *cessante ratione cessat et ipsa lex*, we submit that it is applicable and unanswerable.

Such is the principle of the law, which in practice has become obsolete; for it is the constant custom of the Court, upon conviction on an indictment, to order other stolen property to be restored to the respective owners, without the expence and delay attendant upon fifty prosecutions. Considering, therefore, that the principle is not impugned, and that the practice has deviated, even in the cases to which the law in strictness applied, the Court will hardly now extend it to a case to which it has never been before applied; for it will not, of course, be said that in ancient times ago this law was ever extended to the case of forgery of stock; which, if it had then existed, would in all probability have been held, not a felony, but a misdemeanor; and, in fact, there is not a case upon the subject, which is not confined to actual property in possession. Practice.

The law, therefore, does not apply to the present case; but even if it did, the whole argument used is, that

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we are availing ourselves of a felony, which is not the fact; we avail ourselves of the receipt by the house of the money. This receipt would not indeed have happened unless there had been a felony; but can the house, who have acknowledged the receipt for the use of those trustees, say they have not received it, because one of the firm obtained it by felony? Are they not estopped from this defence?

Election.

There is nothing new in the observations respecting the law of election, except as to the alleged disaffirmance. We have heard to-day only what was urged before Lord *Eldon*, and in the Court of King's Bench. Lord *Eldon* directed that the purchasers might have an opportunity, if they thought fit, to set up a claim; and he directed, in case any objection should be made on their part, that they should have notice of the trial of the issue; and accordingly they had notice of the trial of the issue.

Lord CHANCELLOR.—Did they interpose at all?

Mr. Serjeant *Bosanquet*. — No, my Lord.

And, with respect to the disaffirmance, the fact is, that a party, who may have a right of action against the Bank, stipulates with the Bank that he will prove against the bankrupt's estate, and assign his proof, that the Bank may not, by a formal objection, lose their dividend, to which, if they pay the whole debt, they will in justice be entitled—a stipulation which is so far from being objectionable, that, before the statute enabling sureties to prove, it was the constant practice of the Court to compel the creditor to prove, to protect the interest of the sureties, who would be entitled to the dividends upon a payment made by them after the proof. *Beardmore*

v. *Cruttenden, Cooke*, 211; and so anxious was the Court to protect the right of the surety, that in *ex parte Atkinson, Cooke*, 210, where the surety, previous to the proof by the creditor against the principal, had lodged the amount of the debt with a banker in trust for the creditor, the surety was permitted to retake the money, for the purpose of enabling the creditor to prove against the principal.

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With respect to assumpsit being maintainable because the money was drawn out by *Fauntleroy*, it is an assertion without proof. It is said that a sum of 10,000*l.*, and a sum of 6,000*l.*, was drawn out somewhere about this time, from which the Court is to infer, that the petitioners are bound to admit that the 16,000*l.* was the proceeds of the stock in question; but it is not pretended that he did not pay much larger sums into the house; and it is, therefore, equally applicable to any other sum.

Assumpsit.

As to an action not being maintainable before the bankruptcy, it was decided in the Court of King's Bench that the right, which existed the moment the house received the money, was only suspended upon the conviction. (a)

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Mr. Serjeant *Wilde* in reply: —

The substance of the defence is, that there was a good legal debt, and if not, that there was a good equitable debt, subsisting before the commission issued.

(a) See *ex parte Bousmaker*, it is not proveable till time of 13 *Ves.* 71, as to a debt to an peace. But query, does the con-alien enemy contracted during viction extend only to chattels peace, for which a claim may be in possession?
entered in time of war, although

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As to the objection to the debt at law arising from the case of *Davis v. The Bank of England*, how has our reasoning been attempted to be answered? By saying that, notwithstanding the express directions of the act of parliament the stock is transferred; and that many practical difficulties may arise if it is not so determined. Is this an answer? Is the difficulty occasioned by the violation of a law a reason to shew that the law has not been violated? Trusting to the provisions of an act of parliament, the stockholder knows that his stock cannot be transferred without his consent. Is he to be told, that his dissent is of no avail, because the felony is attended with great practical difficulty?

It was not so said by the Court in the case of *Ashby v. Blackwell*, 2 *Eden*, 299, where "the plaintiff, being possessed of 1,000*l.* Million Bank stock, employed *John Price*, a broker, to receive the dividends for her. He forged a letter of attorney from her, empowering him to sell the stock, which he did to the defendant *Blackwell*, and the stock was transferred into *Blackwell's* name in the books of the company."

"This bill was brought for a re-transfer of the stock, or satisfaction from the other defendants, the trustees of the Million Bank. It being agreed upon all sides that the plaintiff was entitled to relief, the question was, whether the defendant *Blackwell* or the Company should bear the loss. By an order of the Company, no transfer was to be made of their stock by virtue of any letter of attorney executed in the country, unless attested by the minister of the parish and one of the churchwardens; nor by a letter of attorney executed in town, unless attested by two housekeepers, known to one of the directors or to the secretary of the Company. The

forged letter of attorney was attested by two names, which had no addition to them when produced to the secretary of the Company, and he asked *Price* who they were, who answered that the plaintiff executed the letter of attorney in Savile-row, and that the witnesses were housekeepers there; and upon receiving such answer the secretary wrote against their names "Savile-row." In fact, the witnesses were waiters in *Sam's* coffee-house in Cornhill. *Price* had transferred Bank and South Sea stock and annuities under other forged letters of attorney to a large amount, for which he was executed, and the Bank and South Sea Company had made good the losses; and since the detection of this forgery the Million Bank Company had made an order, by which they for the future would make good such losses."

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The LORD CHANCELLOR (the Earl of Northington):—

"The question for me to determine is, whether the trustees of the Million Bank Company, or, in other words, the Million Bank Company or *Blackwell*, are to sustain the loss occasioned by this forged transfer of the plaintiff's stock; and, notwithstanding the authorities cited, I am of opinion that the Company must sustain the loss. By the original deed of agreement, entered into when the Company was formed, there is a clear direction in what manner stockholders shall hold, and in what way they shall be deprived of their stock, to which the mode of transfer is tied up. It was the original intention that transfers should be made personally, and it seems, by operation of law, the method of transfers by letter of attorney was adopted upon this maxim, *Qui facit per alium, facit per se*."

"The letter of attorney is no part of the title, but an authority to transfer. A trustee, whether a private per-

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son or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner the act is a nullity, and in consideration of law and equity their rights remain as before.

“The Company must and ought to answer for their and their servants’ negligence. And it will be of no public detriment if my decree tends to make the directors of public companies to attend to the business of those companies, and teaches them not to leave the important transactions of millions to undirected clerks and book-keepers, with illiberal salaries, and who, therefore, dare not, look a broker in the face.”

“I am, therefore, bound to decree, that the Company restore to Mrs. *Ashby*, the plaintiff, her share of 1,000*l.*, by replacing the same in her name, and account for and pay to her the dividends accrued since the said transfer; and that they pay to Mr. *Blackwell* the sum he paid for the said transfer, together with interest at four per cent.; and that they pay the plaintiff and Mr. *Blackwell* their costs.”

Felony.

With respect to the law upon which the right to restitution is founded not applying to the case of forgery, it is an assertion at variance with all authorities, and the principle upon which these authorities are established. There is not any distinction between choses in possession and choses in action; but all things whatsoever which are comprehended under the notion of personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture. *Hawk. P. C. b. ii. c. 49. s. 9.; Bullock v.*

Dodds, 2 B. & A. 268; and it cannot be contended that the law does not apply to forgery, except by admitting, that, without any prosecution, an action may be maintained against the felon for the proceeds of a forgery.

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The only remaining answer is, that the defendants are estopped from shewing the real nature of the transaction; but this is founded on a total mistake of the doctrine of estoppel. If a joint owner of money colludes with the partner of a bank, to fix the bank, by the partner placing a sum in their drawers, and by the fraudulent partner withdrawing the money, whether it be the actual fifty sovereigns which he so deposited, or five ten pound notes representing them, and the joint owner were to commence an action against the firm, it will not be contended that the innocent members of the firm would be estopped from shewing the truth; and is the fraud the less, because the facility is greater by reason that it is the same individual?

Estoppel.

The law of estoppel applies where a man is concluded, by his own act or acceptance, to say the truth, *Co. Litt.* 352. a.; *Com. Dig.*, *Estoppel*, (A. 1.) But, in the present case, the firm has not acted or accepted: there was no privity between the defendants and the trustees the defendants were defrauded as much as the trustees: This supposed privity does not originate in any commercial relation, but in felony.

Where parties have acted under the employment of another, or accepted a trust for another, he cannot, by reason of his own voluntary acts, gainsay what they have done. But how can this apply to the case where a man has been trepanned by fraud and felony to do an act? Why cannot such person prove that he was as innocent as the plaintiff? Why may he not say; we were wholly

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Martin, Stone, and Co., who acted as bankers in the city for the house of *Marsh and Co.* This payment into the house of *Martin, Stone, and Co.* must, therefore, be considered as a payment to the house of *Marsh and Co.* But it further appears that *Spurling* was in the constant habit, according to an agreement, either expressed or implied, of dividing with the house of *Marsh and Co.* any commission on stock which he was employed by them to sell, and he did so upon this occasion, by paying into the house of *Martin, Stone, and Co.* one half of his ordinary commission as broker, amounting to the sum of 9*l.* and upwards, and which sum was carried by them, together with the other payments, to the credit of the house of *Marsh and Co.* The account between *Marsh and Co.*, and *Martin, Stone, and Co.*, including these items, was subsequently settled, upon more than one occasion, by the house of *Marsh and Co.*, and the firm of *Marsh and Co.* must, therefore, be taken to have been cognizant of the particulars of that account. In addition to these circumstances, it must be noticed, that, upon the apprehension of *Fauntleroy*, a paper was found in his private desk, in the handwriting of Mr. *Graham*, which was to the following effect: "26th May 1819. 15,000*l.* odd, navy fives. 7,105*l.* paid into *Martin's* on the 26th, and on the 28th 8,900*l.* odd, to make up the account, to raise 16,000*l.* money of *H. F. Gahagan and Stone.*"

Such are the facts of the case: — The house of *Marsh and Co.* contracted for the sale of this stock; they effected the transfer of the stock; they received the consideration money for the stock; they divided the broker's commission when the stock was transferred; and, lastly, a member of the firm admitted that the money paid to *Martin, Stone, and Co.* was the money of the trustees. Who then can doubt that, upon this evi-

dence, unqualified by other circumstances, an action for money had and received might be maintained against the house of *Marsh* and Co. ? It has been said, however, that this was a scheme arranged and contrived by *Fauntleroy* ; that the money was paid into the house of *Martin, Stone*, and Co. by his fraud and through his contrivance ; that he afterwards drew it out ; and that nothing remains in the hands of *Marsh* and Co. The evidence does not establish such a case. But, independently of these circumstances, it must be recollected, that the money was paid in upon the general account of *Marsh* and Co. ; that it became part of the general funds of the firm ; and that all money drawn by *Fauntleroy* was upon the general account. I do not see, therefore, how the fact of the money being drawn out by *Fauntleroy*, can be considered as either extinguishing or affecting the claim of the trustees.

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But then, upon the authority of the case of *Davis v. The Bank of England*, which was tried in the Court of Common Pleas, and which afterwards went by writ of error to the Court of King's Bench, where the main point, however, was not decided, it is urged that, in point of fact, the trustees hold their stock ; that they are at this moment in possession of the stock ; that they have never been divested of it ; and that they are still entitled to claim the dividends at the Bank of England. Now, without impeaching the authority of the decision in question, let me rather advert to the difference between the facts of the two cases. Here a contract was made for the sale of the stock, and a transfer in the books was actually effected by the house of *Marsh* and Co., professing to be the agents of the owners of the stock. There is no longer standing in the name of

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the trustees any of that stock ; it has been transferred into the names of other persons ; and, according to the evidence, one part (and probably that is the case with respect to the greater part) became mixed with other stock of the purchasers, and has been since transferred from hand to hand, through many individuals, until it is no longer practicable to trace it. It would be extremely difficult, therefore, to determine what course of proceeding could be adopted for the purpose of restoring the trustees to the situation in which they originally stood. At this moment they cannot sell the stock, because they can make no transfer. There is nothing standing in their names, in the books of the Bank of England, over which they can exercise the power of sale. The Bank of England may, perhaps, be called upon to make a new entry of new stock, to the credit of the trustees ; but it would be difficult to contend that the same stock can be again placed to their credit in the books of the Bank ; nor indeed is it necessary, for the present question, to decide whether the Bank can or cannot be compelled to adopt any particular course. The parties have assumed to act for the trustees ; they entered into a contract for the sale and transfer, and actually transferred the stock from the names of the trustees into the names of the purchasers. Under such circumstances, can the partners in the house of *Marsh and Co.*, who effected these acts professedly as agents of the trustees, who received the consideration money, and continue still to hold it—can they be permitted now to say : “ The acts that we have done are altogether void, because we had not the authority which we professed to have ; the authority under which we assumed to act was founded in fraud and forgery, and therefore void ? ” Surely such a defence was never attempted in a court of law ; and I

am of opinion that it cannot be permitted in this Court, which, with respect to a case of this kind, must be considered as a mixed court of law and equity.

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It was also urged, that some arrangement has been entered into between the trustees and the Bank of England. I have looked at the terms of the agreement referred to, and find that it is an agreement contingent upon the admission of the petitioners' proof. Now if the petitioners have a right (I am not deciding whether they have or have not) of maintaining an action against the Bank of England, and if they have also a right to maintain an action against *Marsh* and Co., they may elect, as was stated in the Court of King's Bench, against which of the parties they will proceed; and it is no objection to say, that they have made an agreement as to something that is to be done, contingent upon their succeeding; nor can that circumstance affect their right to recover from the party, against whom they have elected to proceed.

Another argument stated at the bar, which was a mere repetition of an argument urged in the Court of King's Bench, and to which, therefore, it is only necessary for me to allude, was, that the petitioners are in this case attempting to ratify a felonious act. The Court of King's Bench said, that this was founded upon a fallacy: the felony was complete antecedent to the transfer; the felony was completed by forging the power of attorney; the transfer of the stock was not a felony; the sale of the stock was not a felony; nor was the receipt of the money a felony. All that is ratified and confirmed, or rather all that is adopted, in this case, is the sale, the transfer, and the receipt of the money; and I agree with the Court of Law, in considering that it is a mere fallacy to say, that by adopting these acts the parties are in effect ratifying a felonious act.

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This brings me to the main point relied upon at the bar, and principally urged by Mr. Serjeant *Wilde* in the course of his elaborate argument. I mean that principle of law by which, in cases where a felony has been committed, the party injured is restrained from recovering compensation for the injury in a civil action, until he has prosecuted for the felony. Much of what the learned gentleman brought under the consideration of the Court, in the course of his argument, appears to me, when sifted and considered, to be inapplicable to the present question. No inconsiderable portion of it was grounded upon the law with respect to the restitution of property, in cases of larceny and robbery. According to the old law, (as was stated at the bar, and it is unnecessary to controvert, or to attempt to qualify the proposition,) in cases where the property of two different persons had been stolen by a felon, and one of the parties instituted an appeal against the felon, and obtained judgment and conviction upon such appeal, the other party would not, on that account, be entitled to restitution, unless he also prosecuted his appeal. This argument was pressed upon the consideration of the Court in various forms, and it was contended that it applied, notwithstanding the change in the law, introduced by the statute of Henry the 8th, previously to which act, the prosecution by way of indictment did not entitle a party to his right of restitution. So far, certainly, the rule was founded upon the law relating to larceny, and the questions and distinctions connected with the right of restitution. But there is another principle connected with the same subject, and which is not confined to the case of larceny, but extends to cases of felony generally, not merely to cases of felony at common law, but to cases that have been made felony by subsequent statutes; and this was the principle adverted to by Lord

Tenterden — that a man shall not be allowed to make a felony the foundation of a civil action.

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It is at variance with the interests of society, and contrary to the principles of public policy, to allow a party, injured by any felonious act, to seek civil redress, until he has prosecuted the offender; because, if the civil remedy were permitted, in the first instance, it would too frequently lead to the abandonment of criminal prosecutions. The principle is applicable, as a principle of public policy, to felony generally. It may have arisen indeed out of the law with respect to restitution in cases of larceny. It is undoubtedly connected with it, but as a principle, applicable to cases of felony generally, it is founded upon public policy. This is forcibly stated in the case of *Crosby v. Lang*, 12 *East*, 409, to which I refer, because the leading cases were then brought under the consideration of the Court, by Mr. Justice *Hobroyd* and Mr. Justice *Richardson*, in the course of their argument at the bar.

But, adopting the rule as founded upon principles of public policy, we are to take care that it is not extended beyond what public policy requires; and in this view I am to consider how far it is properly applicable to the circumstances of the present case. Several prosecutions were instituted against *Fauntleroy*; two of them, for forgeries of a similar nature, were prosecuted with effect. He was convicted, and suffered the extreme penalty of the law. It became unnecessary, therefore, for the parties injured in this case to institute any prosecution. There was no ground or principle of public policy that required it; and according to the facts presented to the consideration of the Court, it is by no means clear that the petitioners had the means of

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effectually instituting and carrying on a prosecution. The difficulties have been frequently stated, and it is unnecessary for me to repeat them; but I am bound to add that there was no appearance of any indisposition on the part of the petitioners to do what was necessary for the purpose of bringing the offender to justice.

Upon these grounds, therefore, adverting to the various arguments urged in opposition to what appears to me to be a plain case of claim and title, and thinking the arguments insufficient to invalidate the petitioners' right of proof, I must adhere to the judgment I gave when this case was originally presented to me, and when it was pressed upon my attention — not certainly in so extended a view of the subject — not with arguments so elaborately prepared, and embracing so many topics, but still very clearly and effectively: I then formed a distinct opinion upon the case, and to that opinion I now adhere. Under all the circumstances I think that the petition must be dismissed, and that it should be dismissed with costs.

Ordered accordingly.

An application was then made to the Lord Chancellor, for liberty to file a bill, that the opinion of the House of Lords might be obtained, according, as it was said, to the usual practice in bankruptcy, in cases of magnitude and difficulty. *Bromly v. Goodere*, 1 *Ath.* 76 (a); *Clarke*

(a) In *Bromly v. Goodere*, Lord Hardwicke said: "It came before me originally upon petition, and even then my first apprehension was, that it would bear no great doubt; but as it was insisted that there was no just foundation for the demand, and that, if I determined it that way, my determination would have been subject to no appeal, I chose to have it come before me by

v. Capron, 2 *Ves.* jun., 668; *ex parte Ruffin*, 6 *Ves.* 129 (a); *ex parte Rushforth*, 10 *Ves.* 423 (b); *ex parte Fell*, 10 *Ves.* 348. (c)

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The application was refused.

Ex parte GANE.—In the matter of KEEL.

THIS was an appeal from the decision of the Vice-Chancellor (Sir *John Leach*), whose judgment, with the facts, are reported in 2d *Gl. & Jam.* 319.

L. C.
LIN. INN.
August,
1829.

A commission
issued at the
request of the
bankrupt is
supersedeable.

Mr. Bickersteth and *Mr. Montagu* for the appellant :—

It is the law of the Court, that whenever a commission is, directly or indirectly, the commission of the bankrupt, it cannot stand. The creditors may insist upon a division of the property, but the debtor has no such right. This is settled by an uniform series of decisions; *Menham v. Edmonson*, 1 *Bos. & Pull.* 370 (d); *ex parte*

way of bill." In *Clarke v. Capron*, the Lord Chancellor says: "In the case of bankruptcy, nothing is more usual than to direct a bill to ascertain whether a debt is due."

(a) In *ex parte Ruffin*, Lord Eldon says: "The parties may file a bill."

(b) In *ex parte Rushforth*, Lord Eldon says: "As this is a perfectly new case, I make the order with liberty to file a bill."

(c) In *ex parte Fell*, Lord Eldon says: "If the parties think proper to file a bill upon it, I will not preclude them."

(d) In *Menham v. Edmonson*, 1 *Bos. & Pull.* 370. *Eyre*, C. J. after stating that if the commission was sued out to defeat the bill of sale, and it was done by the contrivance of the bankrupt, the Court would interfere, added: But where the parties before the Court are both

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Bowes, 11 *Ves.* 541 (a); *ex parte Poole*, 1790, 2 *Cox*, 227 (b), *ex parte Steel*, 16 *Ves.* 165 (c); *ex parte Gouthwaite*, 1 *Rose*, 87 (d); *ex parte Gardner*, 1 *Rose*,

creditors standing in an equal degree of right, and equally entitled to favour, unless there be some circumstance of collusion on which we can place our finger, the bankruptcy must take effect. The question is not whether this commission has been taken out to avoid the execution, but whether it has been so taken out with the collusion of the bankrupt himself?

(a) *Ex parte Bowes*, 1805, 11 *Ves.* 541. The Lord Chancellor, in the course of this petition, declared his opinion clearly, that, if the direct object in taking out a commission of bankruptcy is to prevent the execution of a creditor, that is no objection to the commission; provided it is the commission of a creditor, and not that of the bankrupt, which is always vicious.

(b) *Ex parte Poole*, 1790; 2 *Cox*, 227. In this case a petition was presented two years after the commission had issued, and six months after the allowance of the certificate, which had been stayed for a year, to supersede a separate commission, upon the ground that it had been fraudulently issued in concert between the bankrupt and petitioning creditor, and that

the facts had not come to the knowledge of the petitioners at the time when they gave their consent to the allowance of the certificate. The Lord Chancellor said, that when the whole transaction appeared to be such a mere trick and contrivance as it evidently was in this cause, it was impossible for the Court to let such a commission stand. It never will permit its process to be turned into an engine of fraud. And his Lordship directed the separate commission to be superseded at the expence of the bankrupt and petitioning creditor.

(c) In *ex parte Steel*, the Lord Chancellor says: "If this was proved to be the bankrupt's commission, upon all principle and the habitual course in bankruptcy it could not stand.

(d) *Ex parte Gouthwaite*, 1811, 1 *Rose*, 87. The Lord Chancellor: Without doubt a commission may be taken out to defeat an execution, but then it must not be the commission of the bankrupt. The bankrupt meant fairly, but it would be leaning too much towards this affidavit to say, this is not a concerted act; it is hard upon Lyon, but this commission must be superseded with costs.

378 (a); *ex parte Downes* and *ex parte Ansley*, 1 Rose, 398. (b) 1829.

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In *ex parte Staff*, 1818, *Buck.* 249, Sir John Leach expressed an opinion very similar to the opinion expressed in the present case. In *ex parte Staff*, the act of bankruptcy was not concerted, but the commission was issued at the instance of the bankrupt; and His Honour dismissed a petition to supersede. From this decision there was an appeal, (*Buck.* 431,) when the Lord Chancellor said, "With reference to the commission being the bankrupt's commission, I am of opinion, according to the well established rule of this Court, that it cannot stand. The commission must be superseded at the costs of the solicitor and the petitioning creditor." Such are the authorities against the validity of this commission.

THE LORD CHANCELLOR:—

Assuming it to have been the law of the Court, that a commission issued either upon a concerted act of bankruptcy, or at the instance of the bankrupt, must have been superseded, I wish to draw your attention to the provision in the late bankrupt act, by which a trader is entitled to declare his insolvency.

(a) *Ex parte Gardner*, 1812, 1 Rose, 378. right, yet it must be the commission of the creditor, and not of the bankrupt; and although the act of bankruptcy may not have been concerted, yet, if the commission is clearly the commission of the bankrupt, and he evidently has the management and direction of it, the Court will not hesitate instantly to supersede it.

(b) *Ex parte Downes* and *ex parte Ansley*, 1813, 1 Rose, 398. Lord Chancellor: Although a creditor is entitled to a commission of bankrupt as a matter of

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Mr. Bickersteth and Mr. Montagu : —

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This clause, so far from warranting the supposition that the legislature has repealed the ancient law, and sanctioned a commission either upon a concerted act or at the instance of the bankrupt, will, when carefully examined, be found rather to establish the contrary. The doubts entertained upon the principle of this part of the bankrupt law have long been before the profession and the public, and, if the legislature had intended to legalize these commissions, it would have expressed its intentions, and not have confined its enactments to the particular case to which the words of this section apply. Besides if the legislature had so intended, it is probable that some provision would have been made to prevent the injury which an execution creditor generally sustains. “*Vigilantibus et non dormientibus subveniunt jura.*” This, however, has not been done. By the 6th section of 6 Geo. 4. c. 16., a trader is entitled to declare his insolvency, and such declaration is an act of bankruptcy; but, with respect to the commission, the utmost caution has been used to prevent any collusion between the bankrupt and the petitioning creditor: the advertisement must be inserted in the Gazette within eight days after it is filed: no docket can be struck until after the expiration of four days in London, or eight days in the country, from the advertisement; the commission must issue within two months: and there is a proviso, not that the *commission* may be concerted, to prevent which all the previous provisions were inserted, but that no commission shall be deemed invalid by reason of such *declaration* having been concerted or agreed upon between the bankrupt and any creditor or other person.

The utmost which can be inferred from this interposition of the legislature is, that, as an experiment to try how far this innovation may in all cases be expedient, it has, to a certain extent, and with great caution, sanctioned, in one instance, a declaration of insolvency, upon which a commission may issue.

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The statute had scarcely passed before this clause was used, in two cases which came before Lord *Eldon*, as a mode of issuing a concerted commission. The insolvency was declared to exclude the general creditors; and, before the expiration of the four days, another secret act of bankruptcy was committed to favour a particular creditor. Lord *Eldon* superseded the commissions.

The LORD CHANCELLOR:—

I am satisfied that the provision in question is applicable only to the case mentioned in the act; it is unnecessary, therefore, to dwell further upon this part of the case.

Mr. *Rose* and Mr. *Knight* for the respondent:—

Admitting, for the sake of argument, that the law, although without any principle to support it, is as it has been stated; still there are not any facts in this case to connect the petitioning creditor with the bankrupt, whose commission it must be to induce the Court to interfere.

The LORD CHANCELLOR:—

I have heard this case argued at considerable length, because, after having read all the affidavits, I am bound to declare that my opinion differs from the judgment of

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the late Vice-Chancellor. The law has been settled by a variety of authorities; and whatever doubt may be entertained of its policy, consistently with the late enactment respecting a declaration of insolvency, it is not in this place that it can be properly altered or reversed.

It is undoubtedly highly unsatisfactory to be obliged to come to a final decision upon such contradictory affidavits as are now before the Court. (His Lordship then minutely detailed all the facts, and added): If, upon this evidence, I am now called upon to determine, whether the commission was sued out at the instance and by the procurement of the bankrupt, it is impossible for me not to conclude that it was, and to direct the issuing of a supersedeas. I will not, however, preclude the respondents from carrying the case before a jury, if they desire it, and intimate their intention of doing so before the next petition day.

Ordered accordingly.



Ex parte KIRBY.—In the matter of POTTINGER.

THE petition stated, that a commission had issued directed to commissioners at Brighton, of whom one was a barrister resident in Brighton; that the first public meeting was held on the 6th of March; that the barrister resident in Brighton had received 1*l.* for his travelling expenses, because he had travelled from London; that the second public meeting was on the 7th of March, at 10 in the morning, at which meeting 13 creditors, whose debts amounted to 4,210*l.* 18*s.* 6*d.*, had proved; that the barrister resident at Brighton had received 1*l.* for his travelling expences at this meeting; that at this meeting, at 12 o'clock, a memorandum was signed by the commissioners that the meeting was adjourned till half-past 12 o'clock of the same day, for the purpose of admitting several of the creditors to prove and vote; that there was no necessity for such adjournment; that no creditor proved; that the meeting was not in fact adjourned; that the commissioners did not quit the room, but that they received their fees as for a separate meeting; that at half-past one the commissioners signed a memorandum that the meeting was adjourned till half-past two, for the purpose of affording the solicitor time to fill up the assignment and bargain and sale; that there was not any necessity for such adjournment, and that the assignment and bargain and sale were on the usual printed forms of assignments and bargain and sales; but the commissioners received fees as for an additional meeting.

L. C.
LIN. INN.
August 11,
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When commissioners take more than the statutable fees, the commission will be renewed to other commissioners.

The petition prayed that the commission might be renewed to London commissioners, and that the costs of the application, and of the renewed commission, might be paid by the commissioners.

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The *Solicitor General*, Mr. *Montagu*, and Mr. *Swanston*,
for the petitioners: —

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The law is contained in 6 G. 4. c. 16. s. 22. (a), which
was adopted from 5 Geo. 2. c. 30. s. 42. (b), and which
was inserted in that act in consequence of a petition to

(a) 6 G. 4. c. 16. s. 22. "That the said commissioners shall receive and be paid the fee of twenty shillings each commissioner for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate; and where any commission shall be executed in the country, every commissioner, being a barrister at law, shall receive a further fee of twenty shillings for each meeting; and in case the usual place of residence of such commissioner, being a barrister, is distant seven miles or upwards from the place where such meetings are holden, and he shall travel such distance to any such meeting, he may receive a further sum of twenty shillings for every such meeting; and every commissioner who shall receive from the creditors, or out of the estate of the bankrupt, any further sum than as aforesaid, or who shall eat or drink at the charge of the creditors or out of the estate of the bankrupt, or order any such expence to be made, shall be disabled for ever from acting in such or any other commission."

(b) 5 G. 2. c. 30. s. 42. "And whereas the suing out and prosecuting of commissions of bankrupts is at present very expensive, to the great prejudice of the bankrupt and his creditors; be it further enacted by the authority aforesaid, that there shall not be paid or allowed by the creditors, or out of the estate of the bankrupt, any monies whatsoever for expences in eating or drinking of the commissioners, or of any other persons at the times of the meeting of the said commissioners, or any of the creditors; and if any commissioner or commissioners, in any commission, shall order any such expence to be made, or eat or drink at any such meeting at the charge of the creditors, or out of the estate of such bankrupt, or receive or take above the sum of twenty shillings each commissioner for each respective meeting, every such commissioner, so offending, shall be disabled for ever to act as a commissioner in such or any other commission founded on this act, or any of the statutes made concerning bankrupts."

parliament in the year 1718. (a) By this statute a commissioner who receives more than his statutable fee is disabled from acting in the commission.

In the year 1740 Lord *Hardwicke*, for a similar offence, ordered the commission to be renewed to other commissioners. *Ex parte Halliday*, 7 Vin. 77. (b)

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(a) Commons Journals, 1718.
“ On 11th March 1718, when a bill was pending in parliament for preventing frauds committed by bankrupts, a petition of divers merchants and traders in and about the city of London was presented to the House of Commons, and read; setting forth, ‘ that through the excessive charges of commissioners of bankrupts and proceedings thereupon, in most cases of bankruptcy, the estate and effects of bankrupts are swallowed up, and the creditors become losers, most commonly very considerably; that the commissioners nominated in these commissions, being commonly attorneys and persons of an inferior quality to those in commissions of the peace, and under no obligation of an oath for the true and faithful discharge of their trusts, are apt to be very partial and dilatory in their proceedings, out of sinister ends of gain to themselves, to the prejudice of both creditor and debtor; and praying that the commissioners may be obliged to take an oath for that purpose.’ ”

(b) It ought to have been *ex parte Mortimer re Hathway*. Order Book, vol. 16, page 55. *Mortimer* and others petition. The order, after stating the statute, proceeds thus: “ It appearing that the assignee has brought before the Master an account of payments, in which is charged to be paid to the commissioners, for fees of their several sittings on the said commission, 172l. 2s., and to *John King*, the landlord of the inn where the said commissioners met, the sum of 106l. 7s. 3d., which the assignees had, by their examination, admitted to have been paid to the said *King* for the commissioners’ expences in eating and drinking at their sittings, in execution of the said commission; that the said commissioners had received much more than twenty shillings a day for each meeting, and especially the said *William Colman* and *William How* did insist upon and had two guineas a day, and the said *Hughes* and *Wickham* a guinea a day each for every day they sat in execution of the said commission, besides their expences discharged;

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The law thus limiting the amount of the fee to such a small sum as 1*l.*, has been attended with some evil, both in London and Country commissions; as, from the small remuneration of 1*l.*, it has been considered reasonable that the time of each meeting should be limited to two hours; and although in extensive commissions longer meetings are frequently necessary, the commissioners have been obliged to continue their sitting, without any additional remuneration or to adjourn, to the inconvenience of all the parties, to a future day; as from the fear that adjournments to a different hour of the same day might, without sufficient reason, become habitual, and a bonus for delay, they were prohibited both by Lord *Rosslyn* and Lord *Eldon*. To alter this law a clause was inserted in 5 Geo. 4.

Previous pro-
ceedings valid.

that the petitioners were advised the said commissioners taking more than twenty shillings a piece for each respective meeting, or eating or drinking at the charge of the creditors, or out of the estate of the bankrupt, disables them not only from doing any further act as commissioners in the execution of the said commission, but that all acts already done by them since they first received more than twenty shillings each for a meeting, or eat or drank at the charge of the creditors, or out of the bankrupt's estate, are null and void, and of which any debtor to the estate, if sued, may take advantage. Therefore the petitioners prayed that the commission of bankruptcy awarded against the said

bankrupt might be superseded. I do declare, that *W. C.*, *W. H.*, and *S. H.*, named in the said commission, appearing, from the facts laid before me, not to be capable, by virtue of the said act of the fifth year of the reign of his present Majesty King George the Second, to act any longer as commissioners in the execution of the said commission, no further proceedings ought to be had thereupon. And I do therefore order, that all further proceedings on the present commission be absolutely stayed, and that the petitioners be at liberty to apply to me by petition to have the said commission renewed, directed to such new commissioners to be named therein as I shall think fit."

c. 98 (a), to allow double meetings on the same day; but it was not permitted to continue in the statute.

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Such being the rule of the Court, founded rather upon the Chancellor's direction than statutable enactment, the Court, when the rule has been violated, has regulated its judgments according to the motive by which the commissioners were influenced in their conduct. If it originated in mistake, the Court has contented itself with ordering the fees to be returned. *Ex parte Brockback.* (b) If it could not be ascribed to mistake, the

(a) Sect. 25. "That no postponement or continuance of any public or private meeting to another hour of the same day, where the parties are ready to proceed, shall entitle the commissioner to any further fees, unless such meeting shall have been sitting for the space of two hours at the least."

(b) Order Book, 160, p. 792, and 163, p. 307. In *re Witham, Clarke*, 15th August 1822. "The assignees petitioned, stating that certain charges in the said petition mentioned for fees paid for adjournment on the same day that a former meeting took place, and for different meetings on the same day, and also certain charges in the said petition mentioned for drawing and copying certain warrants of commitment, and for signing the same, and also the commissioners' and solicitors' fees therein, were improper, and ought not to be allowed, and praying

that the bill might be referred for taxation to the master, which had been ordered; that by the report of the Master, bearing date the sixth day of December, the Master had certified that the bill, amounting to the sum of 211*l.* 16*s.* 10*d.*, he had taxed at the sum of 161*l.*; and therefore praying, that the said report might be confirmed; that Messrs. *Mayhew* also had presented a petition, stating (*inter alia*) that the Master had only deducted the sum of 23*l.* from one of the bills of costs of 184*l.*, and the said sum, so taxed off, consisted principally of fees paid by the petitioners to the said commissioners; praying that the said certificate might not be confirmed, but that the petitioners might be at liberty to except thereto. Now, upon hearing the said petitions read, I do order, that the said report of Mr. *Courteney* be and the same is hereby confirmed."

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commission has been renewed, in *re Oznam*, 1829. (a)
 Such has been the law and the practice as determined by

(a) Order Book, 152, p. 295. A petition had been presented by *Oddy* to supersede a country commission, and to issue another commission to London commissioners, stating that the commissioners were not proper persons, and that there was not a good petitioning creditor's debt; but this petition did not contain any charges against the commissioners of misconduct respecting fees. It seems, however, to have been mentioned during the argument. The order in book 152, p. 295, proceeds thus:—The said petition came on to be heard before me a short time ago; and it being stated to me, amongst other things, that the commissioners had taken greater fees than allowed by the act of 5th of George 2., I postponed giving judgment on the said petition, in order that the said commissioners might, if possible, explain their conduct to my satisfaction; that the said petition again came on before me, and my attention being called to a case *ex parte Halliday*, determined by Lord *Hardwicke*, in which, under circumstances in some degree similar to those then before me, the said Lord *Hardwicke* removed the commissioners, and directed a new commission to other commissioners. I again postponed my judgment,

and ordered my secretary to lay before me the order of the said Lord *Hardwicke*. On that occasion I intimated that the commission was to be issued, directed to other commissioners; and, by the minutes of an order taken by my secretary, it appeared I had ordered, not that a renewed commission should be issued as before mentioned, but that the said commission should be superseded, and that another commission should be issued, directed to London commissioners, thereby vacating and making void the whole of the proceedings under the said former commission; that the petitioners submitted to me, that the petitioning creditors under the said commission and the petitioners have not misconducted themselves, so as to afford ground for superseding the said commission; that all the usual meetings have been held under the said commission, and the said bankrupt has passed his examination under the same; that my having intimated that the order of the said Lord *Hardwicke*, in the said matter of *Halliday*, furnished a precedent applicable to the present case, the petitioners begged leave to represent to me, that in that case the original commission was not superseded, but suffered to stand and remain;

Lord *Hardwicke*, Lord *Rosstyn*, and Lord *Eldon*; and so inflexible has the rule been considered, that it was

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that in the present case the petitioners have acted under the said commission in only a very trifling degree, and have not paid or become responsible for any tavern expences of meeting under the said commission, nor have they paid the fees to the commissioners acting under the said commission, as charged by them; and the petitioners therefore begged to submit, that it would be a great hardship upon them to be made to suffer for the misconduct of the said commissioners, over whom they had no controul; and therefore praying, that the minutes of my said order might be altered, by directing a renewed commission. And whereas also *John Luke* and thirteen other creditors of the said *Richard Ornam*, all residing in and near the town of Penzance, in the county of Cornwall, did, on the, &c. prefer their petition to me, shewing, that a petition having been presented to me by *John Oddy*, &c., the petitioners therefore, fourteen in number, and creditors of the said *Richard Ornam* to the amount of 10,660*l.* 4*s.* 8*d.*, begged leave to submit to me, that all the usual meetings have been duly held under the said commission of bankrupt, and that the bankrupt has passed his examination under the same; that

the commissioners who acted and carried the said commission into effect are known to the petitioners as men of honour and integrity; that they acted with great diligence and labour, frequently sitting from ten o'clock in the morning until five or six and sometimes later in the evening; that they with great solicitude investigated every account brought before them for proof, before the same was permitted to be proved, when any doubt was expressed, and by their great care ascertained the amount of each debt as correctly as possible, and give universal satisfaction, not only to the petitioners, but to the friends of the said *Richard Ornam* then present (amongst whom was the said *John Oddy*), who were frequently heard to express themselves to this effect; that the commissioners acted towards the creditors of the said bankrupt, and his friends attending on his behalf, with every attention and indulgence, and more particularly in the choice of assignees to the bankrupt's estate, which, at the suggestion of the friends of the said bankrupt, and more particularly of the said *John Oddy*, did not take place on the 11th day of December, the day first appointed in the London Gazette, but was, with the con-

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noticed by Lord *Eldon* in *re Osnam*, although not mentioned in the petition, and although it appeared by a counter petition of a numerous body of creditors, that the commissioners had acted with the greatest industry

occurrence of the present petitioners, adjourned to the 29th day of the present month, that all might have an equal and fair chance in such choice; that the petitioners have been informed, that, at my late sittings, the said petition of the said *John Oddy* and others came on to be heard, when it was stated by me, that the commissioners had taken greater fees than allowed by the 5th of George 2., and that my attention was called to a case, *ex parte Halliday*, before Lord *Hardwicke*, in some degree similar, and that I had directed my secretary to lay the said case before me, and that I had intimated, that the order of Lord *Hardwicke*, in the said matter of *Halliday*, furnished a precedent applicable to the present case, the petitioners begged leave to represent to me, that in that case they are advised the original commission was not superseded, but suffered to stand and remain; that under the present commission the petitioners have proved their debts at much trouble and some expence; that the debts of some of the petitioners are of such a nature that they cannot be proved satisfactorily to the minds of any set of commissioners without their per-

sonal attendance to explain the same, which, should the present commission be superseded and another commission issued, would be attended, from the great distance at which the petitioners live, with further trouble, and a very heavy expence, or oblige the petitioners, or many of them, to forego such proof, and lose all benefit from the said *Richard Osnam's* estate, rather than incur a certain expence in the proof where the estate is so small, and under even which now the petitioners can hope but for a very small if any dividend; that the petitioners respectively begged leave to submit to me, that if the commissioners have in any manner misconducted themselves, it would be hard that the petitioners should suffer for such their misconduct, as the petitioners had no controul over the said commissioners, or have they or any of them paid or become answerable to the said commissioners for their fees, as charged by them, or their tavern expences, or either of them. Now, &c., I do order, that the commission awarded and issued against the said *Richard Osnam* be superseded, and, &c.

and caution, and had sometimes sat from ten in the morning till five in the evening.

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This inconvenience attendant upon the law operates both in London and in Country commissions, although in London it is less perceptible, from more than one commission being appointed for the same time. In country commissions the mischief was, however, much greater; for, in consequence of the small fees, and no allowance being legal for travelling expences, (*ex parte Harbin*, 1 *Rose*, 58; *ex parte Griffiths*, 2 *Rose*, 342,) there was difficulty in procuring the attendance of barristers; or in preventing, if they did attend, their obtaining indirectly what the law did not directly sanction. To remedy these evils the present statute enacted, that a barrister should, in all cases, receive an additional fee, and, when he travelled, that he should be entitled to travelling expences.

The question now is, whether country commissioners are to be allowed to make meetings, and to receive fees for travelling expences when they do not travel?

Mr. Rose and *Mr. Campbell* for the respondents: —

There are no better rules for construing the act of parliament than what are to be collected from the general and cotemporaneous usage of those who are entrusted with the administration of the bankrupt law. In the country, it has been usual to receive such fees as were paid in this case, and it cannot alter the right that a different practice prevails before commissioners in London. In London, only one hour is allowed for a public meeting; in the country, two hours are allowed; and in

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this particular case the commissioners sat, *bond fide*, six hours, which were divided into three distinct meetings. Could it make any substantial difference, whether they held these three meetings on the same day, or on three distinct days? Then as to the travelling fees, the words of the statute are: "and in case the usual place of residence of such commissioner, being a barrister, is distant seven miles or upwards from the place where such meetings are holden, and he shall travel such distance to any such meeting, he may receive a further sum of twenty shillings for every such meeting." Here the barrister who received fees for his travelling expences, had a house in London, and was in the habit of practising in London. Although Brighton, therefore, might be his occasional, London was "his usual place of residence," and he was entitled to a fee of 20*s.* for "every meeting."

The LORD CHANCELLOR: —

Without entering into any question respecting the right to the first travelling fee, I am of opinion that the second, at least, was improperly received, and that the adjourned meetings, on the 7th of March, must be considered, not as distinct meetings, but as forming together a continuing meeting. The mere entry of an adjournment on the proceedings, cannot be permitted to constitute a different meeting. It appears, certainly, from the affidavits, that it had been usual at Brighton to act as these commissioners did; and I am willing to believe that their conduct arose, in some degree, from error in judgment. The words of the statute, however, are clear and imperative. After specifying the fees to be taken, it is enacted that "every commissioner who shall receive from the creditors, or out of the estate of the bankrupt, any further sum than as aforesaid, shall be disabled for ever from acting in such or any other commission." I

find myself, therefore, compelled to order that these gentlemen be prevented from acting further as commissioners of bankruptcy.

The Lord Chancellor afterwards directed that the commission should be renewed to London commissioners, and that the respondents should pay the costs of the application. (a)

1829.

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KIRBY.
In the matter
of
POTTINGER.

Ex parte TINDALL and another.—In the matter of
GIBBINS, SMITH, and GOODE.

V. C.
LINC. INN,
June 18,
1829.

THE petition stated, that by a deed of settlement, made on the marriage of the bankrupt *Smith*, he covenanted with the petitioners, as trustees, in consideration of the marriage and a portion, to pay an annual sum of 80*l.* in trust for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*

S., by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*, on various trusts. S. became bankrupt: Held, that the petitioners were entitled to prove the value of 4,000*l.*, as a contingent debt, against the separate estate of S. (b)

This was a petition to prove the value of the said sum of 4,000*l.*, as a contingent debt against the separate estate of *Smith*.

Mr. *Montagu* and Mr. *Spurrier* for petition:—

The words of the 6 Geo. 4. c. 16. sect. 56., are: “If any bankrupt shall, before the issuing of the commission, have contracted any debt, payable upon a contin-

(a) See *Bowles v. Perring*, 5 *Moore*, 294. as to the propriety of holding a meeting for different purposes on the same day.

(b) *Post*, page 422.

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gency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon." This is a remedial enactment, and must be so construed as to suppress the evil and advance the remedy. The evils which existed previously to this enactment have been repeatedly stated by different judges, and from an early time. *Ex parte Groome* (1744), 1 *Atk.* 115 (a); *ex parte Barker*, 9 *Ves.* 110; *ex parte Caswell*, 2 *P. Wms.* 497; and *ex parte Michell*, 1 *Atk.* 120. The evils were, 1st, that the creditor was deprived of his dividend; and 2dly, the bankrupt continued liable to pay the debts, although deprived of all his property, a hardship which is particularly noticed by Mr. Justice Yates in *Mayor v. Steward*, 4 *Burr.* 2443.

The inconvenience and injustice which resulted from this state of the law, and the opinions expressed by different judges, were known to the legislature when this remedial enactment was passed, and with this knowledge, the most general words have been selected, for the express and obvious purpose of supplying an effective remedy. There is no reason, therefore, for supposing that the words of the clause, which are sufficiently comprehensive to include the present case, do not extend to it. (b)

(a) See ante, page 301.

(b) "The statute uses general words, without any restriction, and I see no reason why they should not be understood in their generality." Per *Le Blanc, J.*, *Read v. Sowerby*, 3 *M. & S.* 81.

Mr. Sugden and Mr. Rolfe for the assignees :—

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The objections to the proof are, 1st, that the demand in this case is not a debt contracted ; and 2dly, that it is not a contingent debt within the meaning of the act.

Ex parte
TINDALL
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As to the first point there is not any debt contracted. The words of the 56th sect. are : “ If any bankrupt shall, before the issuing of the commission, have *contracted* any debt (a) payable upon a contingency :” but this is not a debt contracted on a contingency : it is as yet contingent whether this will ever be a debt ; and it is probable that it never will be, because the marriage took place twenty years ago. There is no issue of the marriage in existence ; and if the husband survive the wife, the obligation will altogether cease. There is at present, therefore, a mere covenant, in respect of which, under some circumstances, a debt may hereafter accrue. Suppose the vendor of an estate covenants with the vendee that he will return the amount of the purchase money if the vendee should be at any time evicted, can the vendee require, under a commission against the vendor, that the chances of eviction shall be calculated by the commissioners, and that he shall be permitted to prove ? The statute only applies to cases where a sum is certainly due at some time, although at an uncertain time.

2dly. This is not a contingent debt within the meaning of the statute. The contingencies contemplated by the legislature are such as the commissioners may value, and

(a) The words in the 47th section are : “ That every person with whom any bankrupt shall have really and *bonâ fide* con-

1829.

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 and another.
 In the matter
 of
 GIBBINS
 and others.

where the creditor will become instantly entitled to his dividend. In contingencies dependent upon time, there may, it is true, be such a rebate as to enable the commissioners to ascertain the value; but it can hardly be supposed that the legislature intended the commissioners to ascertain the value of a contingency which may never happen, and which must depend upon an intricate calculation of chances. Had any necessity for such a calculation been contemplated by the legislature, it is scarcely possible to suppose that some special provision would not have been made, as in the 54th section, relating to the valuation of annuities. (a)

That the words of the clause should not be extended to such contingencies, is further apparent from the direction in the act, that upon the proof being admitted the creditor shall be entitled to his dividend. This immediate payment of a dividend marks the species of contingency, unless it can be supposed to have been the intention of the legislature that a dividend should be paid under the bankruptcy, although none would have been payable had the contracting party remained solvent. If it had been intended that such contingencies should be included, a claim would have been ordered to have been entered, until it was ascertained whether any dividend would become due, as the legislature has ordered in the

(a) The words of the 54th section are: "Any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

53d clause relating to bottomry and respondentia debts. The words there used are : “ The obligee in any bottomry or respondentia bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and, after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors as if such loss or contingency had happened before the issuing the commission against such obligor or insurer.”

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Mr. *Montagu* in reply : —

The words “ contracting a debt,” considered by themselves, might imply that the engagement must be of such a nature as to enable the creditor to maintain an action before the bankruptcy ; but the words immediately following are, “ payable upon a contingency which shall not have happened before the issuing of the commission ;” from which it is clear that the cases within this clause are cases in which no action was maintainable before the commission, but where, if the engagement had been absolute, an action might have been sustained. That it was the intention of the legislature that the act should not be limited merely to contingencies depending upon time, appears from the nature of the evil previous to the enactment, and from the general words used in the statute. The nature of the evil was far more extensive and important with respect to contingencies which might never happen, than to mere temporary contingencies, as in the case of guarantees, and cases dependent upon survivorship.

In *ex parte Barker*, 9 *Ves.* 110, Lord *Eldon* says : “ This is a debt payable at an uncertain time.” “ Upon

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—
Ex parte
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the authorities, it is true, no case has decided that such a debt as this shall not be proved; for in all the cases there has been another contingency; for instance, a wife surviving her husband: sometimes more than one; always some contingency, not only making the time uncertain, but whether the debt would ever be payable." "In *ex parte Grooms* (a) and *Tully v. Sparkes* (b), cited by Lord *Hardwicke*, it is observable that there was a contingency, not only as to the time when the debt would be payable, but whether it ever would be payable."

The only question, therefore, is, whether the words used are sufficiently general to extend to this case. If it had been intended that the clause should be confined to contingencies depending only upon time, instead of using general words, particular words, limiting the operation to temporary contingencies, would have been selected, such as, "shall have contracted any debt payable at an uncertain time;" a proviso similar to that in the 51st section, that "any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent., to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it

(a) 1 *Atk.* 115.

(b) 2 *Lord Raym.* 1546.

was contracted ;” and to the provisions relating to annuities, and bottomry and respondentia bonds, where, when the legislature intended that the provision should be special, there is a special enactment. It was therefore intended, as it is expressed, that the remedy should be general ; and the words ought, therefore, to be construed in the general sense in which they have been used.

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Ex parte
TINDALL
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and others.

As to the difficulty of ascertaining the value — courts of justice are never deterred by difficulties, whether real or imaginary, but hear evidence and decide. And as to the evil of paying a dividend, although it may in some cases be injurious to the bankrupt’s estate, it may in some be beneficial, by the payment being on a proof to a less amount ; but in all cases the Lord Chancellor may restrain the payment of the dividend until the event is determined, according to the regulations respecting bottomry and respondentia bonds.

The VICE-CHANCELLOR : —

When the nature of the evils which existed previously to the enactment in question, with the general words of the statute, are considered, there appears to me to be no reasonable doubt. Adverting to the terms in which the intention of the legislature is declared, I think the Court is not entitled to limit the operation of the clause to one species of contingency, and to exclude all others of equal or of greater importance. The order must be made as prayed.

Ordered accordingly. (a)

(a) After this case was printed, Chancellor, and the judgment of the Vice-Chancellor reversed. See *post*, page 422.

L. C.
LINC. INN,

Ex parte EAGLE and others. — In the matter of
GIBBINS, SMITH, and GOODE.

S., by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators, should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*, on various trusts.

S. became bankrupt: Held, that the 4,000*l.* was not capable of valuation by the commissioners, and that the trustees were, therefore, not entitled to prove against the separate estate of S. within the meaning of the 6 Geo. 4. c. 16. s. 56.

Case 2 / Inst. 462

THIS was an appeal from the decision of the Vice-Chancellor in *ex parte Tindall* and another, in the matter of *Gibbins* and others, reported *ante*, page 415.

Mr. Knight and Mr. Rolfe for the appellants:

The deed upon which the question arises is as follows: "By deed of settlement, dated the 1st day of August 1815, made on the marriage of the bankrupt, the said *W. W. Smith*, with *Elizabeth Gray*, the said *W. W. Smith* covenanted with the said *Thomas Tindall* and *Richard Bird* as trustees, in consideration of such intended marriage, and of 1,300*l.* navy 5 per cents. paid to him by the said *Elizabeth Gray*, and also in consideration of the further sum of 1,000*l.* paid to him by *E. O. Gray*, the father of the said *Elizabeth Gray*, to pay an annual sum of 80*l.* to the said *Thomas Tindall* and *Robert Bird*, trustees, by four equal quarterly payments, during the joint lives of the said *W. W. Smith* and his wife, the said *Elizabeth Gray*, for her sole and separate use. And further stating, that the said *E. O. Gray* thereby also covenanted with the said *Thomas Tindall* and *Richard Bird*, that in case the said marriage should take effect, his heirs, executors, or administrators should, on or before the expiration of twelve calendar months next after his decease, pay unto the said *Thomas Tindall* and *Richard Bird* the sum of 4,000*l.*; and further stating, that in consideration of such covenant of the said *E. O. Gray*, the said *W. W. Smith* covenanted that his heirs, executors, or administrators should, within twelve calendar months after his decease, pay unto the said *Thomas*

Tindall and *Richard Bird* the sum of 4,000*l.*; and it was declared by such deed that the said *Thomas Tindall* and *Richard Bird* should stand possessed of the said several sums, upon trust, during the life of the said *W. W. Smith*, to pay the interest, dividends, and annual income of the said trust monies, stocks, funds, and securities, unto the said *W. W. Smith* and his assigns, and after his decease to the said *Elizabeth Gray*, for her own use and benefit, and after the decease of the survivor of them, to pay and transfer the said trust monies and interest unto the children of the marriage, in manner as therein mentioned; and in the event of failure of issue of the said marriage, to transfer the said trust monies, and the interest, dividends, and annual produce thereof, unto the survivor of them the said *W. W. Smith* and his wife, his or her executors, administrators, and assigns, for his and their own proper use and benefit."

1829.

Ex parte
EAGLE
and others.
In the matter
of
GIBBINS
and others.

To the proof upon this instrument there are two objections:

1st, There can be no proof by virtue of the 56th section of the last bankrupt act, except in cases where the party seeking to prove has, according to the language of the act, *contracted a debt*. In *ex parte Grundy* (*ante*, 203) there was a bond, and a strict legal *debt*. In the present case no *debt* has been contracted. Where a person covenants to pay money on a future event, and the event happens, the money then becomes due from the covenanting party; it becomes a debt from him, and an action of debt may be maintained against him. But a covenant that another person shall pay money is a mere collateral engagement, for breach of which no action of debt can ever lie. A covenant that the executors of a covenantor shall, after his decease, pay a sum of money is, in effect, a mere charge on the assets of the

V. C.
LINC. INN,
Jan. 8,
1830.

A. advanced 2,000*l.* to B., to be repaid on a day certain, and secured by the bond of C., conditioned that if B. made default in payment on the day named, C. should pay within one week. C. became bankrupt, and B. afterwards made default: Held, that the debt was proveable under the commission against C.

Ex parte LEWIS and another, assignees of CAUTY.
In the matter of CHARMAN.

THE petition stated, that *Cauty* advanced to *Collier* 2,000*l.*, to be repaid on the 29th June 1826. The loan was secured by an assignment of pictures; and by the bond of *Charman*, conditioned, that in case *Collier* made default in payment of the 2,000*l.*, and interest, on the 29th June 1826, *Charman* should pay within one week after default made by *Collier*.

On the 16th May 1826, the commission issued against *Charman*. Default was made by *Collier* on the 29th June. The commissioners rejected the proof, because it was not absolute at the bankruptcy.

The petition prayed that the debt might be proved.

Mr. *Montagu* and Mr. *Knight* for the petition:—

The reasoning was of the same nature as in *ex parte Tindall* (a), with the additional observation, that in a late case, before the Lord Chancellor, of *ex parte Gundry* (b), no doubt had been expressed, either at the bar or by his Lordship, as to the 56th section extending to cases contingent at the time of the bankruptcy.

Ordered as prayed.

(a) *Ante*, 414.

(b) *Ante*, 293.

Ex parte TAYLOR.—In the matter of TAYLOR.

L. C.
LINC. INN,
Nov. 8,
1828.

THE petition stated, that the petitioner had employed Messrs. *Sherwoods*, as bricklayers, and Messrs. *Wrights* as engineers; that he had paid Messrs. *Sherwoods* upwards of 3,000*l.* from time to time, as they wanted payment; that the work was completed, and there remained a sum of about 300*l.* due to Messrs. *Sherwoods*, which, as soon as the accounts had been examined, the petitioner would have paid; that he had made an appointment with them to settle the accounts, which they had not kept; that a second appointment had been made, at which, also, they did not attend; that the petitioner had commenced an action against Messrs. *Wrights* for 1,300*l.*, for the noncompletion of a contract with the petitioner respecting some machinery; that the solicitor of Messrs. *Wrights* was connected with them in various speculations respecting machinery; that, to the surprise of the petitioner, a commission of bankruptcy had been issued against him, upon the petition of Messrs. *Sherwoods*; that the commission was issued in reality by Messrs. *Wrights*, who were employing Messrs. *Sherwoods*, and that the gentleman who acted as solicitor, was not Messrs. *Sherwoods*' solicitor, but had lent his name to the solicitor of Messrs. *Wrights*; that a meeting of the commissioners had been held, at which Messrs. *Wrights*' solicitor and his clerk attended, and took down the depositions, and endeavoured to satisfy the commissioners that the petitioner was a trader; that persons in the employ of Messrs. *Wrights* had attended to prove the act of bankruptcy; that the petitioner was not a trader; that he had been engaged for many years, at an expence of near 20,000*l.*, in preparing machinery to make pins;

On an application by a person against whom a commission of bankrupt had issued, that counsel might be permitted to attend the commissioners, on his behalf, before adjudication, the Lord Chancellor declined to make any order, but intimated his opinion, that, under the circumstances, it would be proper for the commissioners to comply with the request.

1828.

Ex parte
TAYLOR.
In the matter
of
TAYLOR.

that he had not sold or contracted with any person to sell pins, nor were any of the pins manufactured by him in a state fit for sale; that he was amply solvent, and ready to pay into court every farthing which he stood indebted to any person who did not consent to the commission being abandoned; that he had not committed any act of bankruptcy; that it is not the practice of the 13th list of commissioners to admit counsel at the opening of a commission, to cross-examine witnesses in support of the commission, or to permit the party, against whom it had issued, to call witnesses.

The petition then contained the following allegation: "That if the said commissioners shall be induced to adjudge your petitioner to be a bankrupt, such decision will be attended with the total ruin of your petitioner, and the irrecoverable loss of the large sums of money which he hath expended upon the said manufactory and machines, which are now ready to begin working, and when put into operation are capable of producing to your petitioner a very large income."

The petition prayed for a supersedeas, and then proceeded as follows: "But if your Lordship should not think proper so to order, in the first instance, then that your Lordship will be pleased to direct that your petitioner should be at liberty to attend by his counsel before the said commissioners, and to enable the said commissioners to see the whole truth, by a cross-examination of witnesses and the production of witnesses on his behalf; and, in the meantime, that all proceedings under the said commission may be stayed, or, if your Lordship should not think proper so to order, then that the advertisement may be stayed in the Gazette until the proceedings have been seen by your Lordship."

Mr. *Sugden* and Mr. *Montagu* for the petition : —

1828.

Unless the Court will interfere, there is no man who may not be ruined by these *ex parte* proceedings. It is the practice with some lists of commissioners to permit the attendance of counsel before adjudication, where the circumstances of the case appears to render it desirable. It was permitted in two remarkable instances, and Lord *Eldon* approved of what had been done. These instances were in the bankruptcy of *Bryant*, before the first list, and in the case of Mr. *Harcourt*, (2 *Rose*, 203,) against whom a commission had issued, directed to the third list.

Ex parte
TAYLOR.
In the matter
of
TAYLOR.

The LORD CHANCELLOR : —

In the absence of a direct authority, I am not disposed to make any order upon the subject, nor is it necessary that I should, for, probably, an intimation of my wish that counsel should be permitted to attend and be heard, will answer the petitioner's object.

Mr. *Sugden* and Mr. *Montagu* acquiesced, and counsel were subsequently permitted by the commissioners to attend. Upon their attendance, and cross-examination of the witnesses, the commissioners refused to find the bankruptcy.



L. C.
LINC. INN,
July 29,
August 10,
1829.

The drawer of a bill of exchange became bankrupt, and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him, for some time after the bill became due: and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer.

Ex parte ROHDE and another. — In the matter of RAINS.

IN this case a feigned issue had been directed by the Vice-Chancellor (Sir *John Leach*) to try the question whether certain bills of exchange were proveable by the petitioners, as assignees of *Sawyer* and Co., the indorsees of the bills, under a commission against *Rains*. The issue was tried before *Abbott*, C. J., under whose direction a verdict was found by the jury for the plaintiffs, establishing that the bills in question were proveable under the commission against *Rains*.

On a petition presented by the defendants to the Lord Chancellor (Lord *Eldon*) for a new trial, his Lordship directed the following case for the opinion of the Court of King's Bench:—

“ The five bills of exchange set forth in the declaration became due in the month of June 1818. The drawer, *J. S. Rains*, left his dwelling-house on or about the 17th April 1818, absconded and went abroad, and never returned again. On the 20th of April 1818, a commission of bankrupt was issued against *John Soady Rains*, under which commission the defendants were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the said bills of exchange became due. The bankrupt did not surrender to his commission; the time for which surrender was limited to the 23d June 1818. The bankrupt's house remained open, in possession of the messenger under the commission, for some time after the bills were due. The acceptor became bankrupt on the 23d April 1818, and the bills were dishonoured when they became due, but no notice of the dishonour was

given to the drawer or left at his house. The holders of the bills had notice, before the bills became due, that the defendants had been chosen assignees of the estate and effects of the said *John Soady Rains*, but no notice of the dishonour of the bills was given or attempted to be given to the said defendants. The commission of bankrupt against Messrs. *Sawyer*, *Jobler*, and Co. was issued on the 29th day of October 1818, and the plain tiffs are their assignees and holders of the bills.

1820.
—
Ex parte
ROHDE
and another.
In the matter
of
RAINS.

“ The question for the opinion of the Court is, Whether, under the circumstances, the bills were provable under the commission issued against the drawer ?

“ *Frederick Pollock* for the plaintiffs.

“ *N. C. Tindal* for the defendants.”

This case was argued before the Court of King's Bench in Trinity Term 1825, and the judgment of the Court was delivered by *Bailey*, J. in the same term. (a) A certificate, signed by the four judges, was afterwards sent to the Lord Chancellor, stating the opinion of the Court to be, that the bills were not provable by the plaintiffs under the commission issued against the drawer. The plaintiffs, the assignees of *Sawyer* and Co., being dissatisfied with this decision, presented the present petition, stating that the case had been argued in the Court of King's Bench during the absence of the Lord Chief Justice, and that his Lordship had, in his summing up to the jury, on the trial of the issue, stated his opinion to be, that it was not necessary for the holders of the bills to have given notice of their dishonour to the assignees of *Rains*.

(a) See 4 B. & C. 517.

1829.

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Ex parte
 RONDE
 and another.
 In the matter
 of
 RAINS.

Under these circumstances, the petitioners prayed that the certificate of the Court of King's Bench might not be confirmed, and that the case might either be reheard before the Lord Chancellor, or put in a course for decision by a Court of Error.

Mr. *Solicitor General*, Mr. *Rose*, and Mr. *Beames*, for the petition, referred to the cases mentioned in *Rohde v. Proctor*, 4 B. & C. 517, and to the circumstance of the Lord Chief Justice being absent from the Court during the argument.

Mr. *Horne* and Mr. *Montagu contra*.

Aug. 10.

THE LORD CHANCELLOR:—

When this case was brought under the consideration of Lord *Eldon*, no opinion was expressed by his Lordship, but a special case was agreed upon between the parties, and sent to the Court of King's Bench. We have now the opinion of that Court, but an opinion, as it is urged, expressed during the absence of the Lord Chief Justice, and contrary to what his Lordship stated on the trial of the issue. In point of fact, however, the statement on the special case was very different from what appeared on the trial, and there was, in reality, no discrepancy. The Lord Chief Justice has besides informed me, that he entirely agrees with the judgment delivered by Mr. Justice Bayley, and that he thinks "the safest rule, and most conformable to the law merchant, is to require notice where the house of the drawer is open and his assignees known, and this notwithstanding his bankruptcy."

It was, in fact, a particular and special case: the house was open, and the messenger in possession. I agree,

therefore, in opinion with the Court of law, that it was enough to decide the particular and special case, and that it would have been travelling out of the way to decide the general point. I must, therefore, dismiss this petition with costs.

Ordered accordingly.

1830.

Ex parte
RONDE
and another.
In the matter
of
RAINS.

Ex parte CALDECOTT. — In the matter of WHITE
and another.

L. C.
LINC. INN,
Jan. 11,
1830.

THIS was a petition by one of four assignees, praying that the respondent might deliver up a deed, or permit a copy to be taken. It was attested as follows: "I attest this to be the signature of the said *Andrew Caldecott*. *W. H. Ashurst*, his solicitor, in the matter of this petition."

The signature of a petitioner attested in the following terms: "I attest this to be the signature of the said *A. Caldecott*. *W. H. Ashurst*, his solicitor, in the matter of this petition," is a sufficient compliance with the general order of the 12th of August 1809.

The *Solicitor General* and *Mr. Montagu* objected; 1st, That a petition by an assignee could not be supported, without assigning some reason for the others not having joined. 2d, That the attestation was not sufficient, the requisite form being signed by *A. B.*, in the presence of *C. D.* solicitor for the petitioner, &c.

Semble, that the word "authenticate" would also be sufficient.

In support of the latter objection they cited *ex parte Bury*, *Buck*, 393; *ex parte Titley*, 2 *Rose*, 84; *ex parte Bellott*, 2 *Madd*. 259; all of which had been considered and the rule settled in *ex parte Dumbell*, 2 *G. & J.* 121, where the Vice-Chancellor (*Sir John Leach*) said, "he had carefully examined all the cases upon the subject, and that his opinion was 'authenticated' had no acceptance within the meaning of the order, and that it could not be received as attestation."

Where a petition was presented by one of four assignees, describing himself as "acting assignee," and stating the absence of two of his co-assignees, the petition was permitted to proceed.

1830.

Mr. *Rose* and Mr. *Macarthur contra* : —

Ex parte
CALDECOTT.
In the matter
of
WHITE
and another.

The petitioner describes himself as the “acting assignee” under this commission, and states that one of his co-assignees has become bankrupt, and left the kingdom; that another has retired from business, and now resides at Worthing; and that the petition is presented with the knowledge and concurrence of the fourth. Under the circumstances Mr. *Caldecott* was warranted in presenting the petition in his own name.

The words of the general order of the 12th August 1809, are, “that the signature of each person signing as a petitioner shall be *attested* by the solicitor, &c. ;” and here the words used are, “I attest this to be the signature, &c.,” which is the strictest compliance with the direction of the Court.

The LORD CHANCELLOR : —

In *ex parte Titley* the signature of the petitioner purported to be “authenticated,” not “attested,” by his solicitor, who had not witnessed the signing, but acted upon his knowledge of the petitioner’s handwriting. Lord *Eldon* decided that the spirit of the order had been complied with, stating that “its object was to have the pledge and responsibility of a solicitor of the court to the propriety of the application.” These observations appear to have escaped the attention of the Vice-Chancellor in *ex parte Dumbell*. But, at all events, *authenticate* is a different word from *attest*. *Attest* means seeing the party sign. Without evidence to the contrary, therefore, I shall presume that the solicitor, in this case, saw the petitioner sign. Upon the other point, I am not disposed to think, under the circum-

stances stated, that the petitioner is irregular in presenting this petition in his own name, and it must, therefore, proceed. (a)

1830.

Ex parte
CALDECOTT.
In the matter
of
WHITE
and another.

Ex parte VITTERY and others. — In the matter of POMEROY.

WEST.,
L. C.
Nov. 20,
1829.

A petition had been presented, stating that various expences had been improperly incurred under a commission; and praying that the bill might be referred to the master for taxation; that the petitioning creditors might not be allowed the expences of witnesses brought from the country, or the costs of the provisional assignment, or auxiliary commission, or of the private meetings before the commissioners, between the finding of the bankruptcy and the choice of assignees; and that the auxiliary commission might be superseded and the

An application to the Court to vary the minutes of an order before they have been settled in the secretary's office is irregular.

(a) *Ex parte* CHESTER and another. — In the matter of YATES.

THIS was a petition by two assignees on behalf of themselves, and a third assignee. The third assignee, who had not signed the petition, resided forty miles from London. Mr. *Whitmarsh* objected, that this was not a sufficient compliance to the general order.

Mr. *Jacob* *contrd.*

The VICE-CHANCELLOR: —

If this had been the petition of the three, I think they must all have signed; but as it is the petition of two, on behalf of themselves and a third, I think there is no objection to it.

1829.

—
Ex parte
VITTEY
and others.
In the matter
of
POMEROY.

proofs taken thereon, and the proofs taken under the original auxiliary commission under the original superseded commission might be transferred to the present existing London commission.

Upon the hearing of this petition the Lord Chancellor expressed his opinion, that the expences had been wantonly incurred, and directed a reference to the master.

The minutes of the secretary were as follows: " I do order that it be referred to the vacation master of the Court of Chancery to inquire and certify, 1st, Whether the expences incurred in the bringing of the several witnesses from Dartmouth to London, to establish the adjudication of the bankruptcy of the said *R. Pomeroy* under the said London commission of bankrupt, as mentioned in the said petition, were necessary and properly incurred? 2dly, Whether the appointment of a provisional assignee under the said commission was necessary and properly incurred? 3dly, Whether the expences incurred of the messenger's journey to Brixham were necessarily incurred? and lastly, Whether the several private meetings before the commissioners, under the said commission, between the finding of the bankruptcy of the said *R. Pomeroy* and the choice of assignees under the said commission, were necessary and proper?"

Mr. *Montagu* now moved to amend the minutes, by directing the master to inquire and certify what expences were incurred in bringing witnesses from Dartmouth to London to establish the adjudication of the bankruptcy of the said *R. Pomeroy*, under the new London commission, as mentioned in the said petition; and also what charges were incurred on the appointment of a provi-

sional assignee under the said commission; and also what expences were incurred by the messenger's journey to Brixham; and lastly, what charges were incurred in the several private meetings before the commissioners between the finding of the bankruptcy and the choice of assignees under the said commission, without prejudice to the respondent's submitting to the master any evidence in justification of all or any of these charges, instead of referring to the master the propriety or necessity of the several charges and expences aforesaid, as the said minutes now stand.

1829.

Ex parte
VITTEY
and others.
In the matter
of
POMEROY.

He stated, that by the minutes as now framed, the question, instead of being decided by the Court, was referred to the master for decision; and that he understood the intention of the Court was, to declare that the costs were wantonly incurred, and to refer it to the master to tax the bill, without prejudice to the respondent's offering further evidence as to the propriety of the charges.

Mr. *Pepys* and Mr. *Ching* submitted, that the parties ought first to have applied to the secretary of bankrupts, which they had not done, and that this application was virtually to rehear the petition.

The LORD CHANCELLOR:—

I was of opinion, as far as I recollect, and I now think, that the costs were wantonly incurred; but I meant to refer it to the master to consider the whole question, which, when the Court has doubt as to the facts, is not unusual. This application is irregular, as the petitioners have not been before the secretary to settle the minutes, and this motion must, therefore, be refused with costs.

V. C.
LINC. INN,
January
1830.

If, at a meeting of creditors, one of the creditors dissent from the execution of a deed of assignment: *Quære*, whether he can issue a commission upon it?

Ex parte BAYLY. — In the matter of BAYLY.

THIS was a petition to supersede, on the ground that the petitioning creditor was a party, and privy to the execution of a deed, which was relied upon as the act of bankruptcy.

It was answered, that the petitioning creditor attended the meeting of creditors, but did not consent to the proposed deed.

Mr. *Rose* and Mr. *Montagu* for the petition:—

It is settled, that a creditor who is a party, or privy to a deed, cannot rely upon it as an act of bankruptcy; that he cannot rely upon the breach of a law as a foundation for a legal proceeding; that it had been ruled, that if at a meeting of creditors, called for the purpose of examining the bankrupt's affairs, it is agreed that he shall execute an assignment, a creditor who is present at that meeting cannot issue a commission upon such assignment as an act of bankruptcy, although he, at the meeting, expressed an opinion against the execution of the assignment. (a) Per *Chambre*, J. *Hicks v. Burfitt*, 4 *Camp.* 235.

(a) *Butcher* and others, assignees of *Smart v. Wroughton* esq. *ex relatione* Mr. *Coleridge*, MS. February 19, 1829.

Walker and *Smart* were partners as grocers at *Devizea*, and as such had contracted a debt of 150*l.* with Messrs. *H.* and *Co.* in London, wholesale tea dealers. Messrs. *H.* and *Co.* (the partner-

ship having been dissolved) had arrested *Walker*, who had gone to prison, and it was expected that he would come out as an insolvent. Messrs. *H.* and *Co.* on this wrote to *Smart* to come up to London, and confer with him as to arrangements about a settlement of the account; he did so, and met their solicitor at

So also if, at a meeting of creditors, it was resolved that a debtor should deny himself for the purpose of committing an act of bankruptcy, a dissenting creditor, who was present at the meeting, could not rely upon it as an act of bankruptcy.

1829.

—
Ex parte
BAYLY.
In the matter
of
BAYLY.

Mr. *Spence contra* contended, that there was no assent, direct or indirect, by the petitioning creditor.

The VICE-CHANCELLOR: —

Although I cannot concur with the decision in *Hicks v. Burfitt*, I am satisfied that, in this case, the petitioning creditor did assent, and that the commission must be superseded.

their house, when a conference ensued, which ended only in an appointment to meet again at five in the evening. There was no threat of an arrest, but the solicitor said the account must in some way be settled. *Smart* did not keep his appointment, consulted an astrologer, and wrote a letter to Messrs. *H. and Co.*, from which it appeared that he was apprehensive of an arrest if he had kept his appointment, spoke of the ruinous consequences of such an event to himself and his creditors, that he knew not where to look for bail, and said that no one should lose a shilling by him if time were given, and that he was going home, where he could not longer be spared from his business; this was on the 22d of June. He

went home, and on his arrival told his foreman what had passed, and spoke of having smelt a writ so strong at Messrs. *H. and Co.* that he had stayed away.

Between the 22d and 30th it appeared that he had made two propositions for a settlement, which were not acceded to; and on the 30th Messrs. *H. and Co.* received good promissory notes from him for the whole amount, which were duly paid.

Best, C.J., ruled, that if the jury believed he broke this appointment with intent to delay Messrs. *H. and Co.*, it was an absenting himself within the statute, and he advised the jury that the intent was clearly so. The jury found in the affirmative. See *Tucker v. Jones*, 2 Bingh. 2 *Toleman v. Jones*, 9 B. Moore.

WEST.,
V. C.
May 25,
1829.

Parties claiming debts and summoned to attend, in the country, for examination under a commission of bankrupt, are not "witnesses" within the meaning of 6 Geo. 4. c. 16. s. 20., so as to entitle them to an auxiliary commission for their examination.

Ex parte KIRBY and others.—In the matter of POTTINGER.

THE petitioner stated, that a commission issued against *Pottinger*, directed to commissioners at Brighton; that the bankrupt's debts amounted altogether to 25,000*l.*; that creditors to the amount of 22,000*l.* resided in London, of whom the petitioner *Kirby* was one; that he had been elected an assignee in opposition to the wishes and exertions of the creditors at Brighton, and the Brighton solicitor; that to harrass the petitioners an application was made, on behalf of two of the Brighton creditors, to expunge the debt proved by *Kirby*, who was in partnership with *Ware* and *Arbuthnot* in London; that all the members of the firm were summoned to attend on the same day at Brighton, and to bring with them all their books of trade. The petition then stated, that the petitioners could not all quit their business without the most serious loss and inconvenience; that they were in a very extensive trade, and had at least thirty clerks and workmen under their daily employment and inspection; that their books were sixteen in number, and that they could not take them into the country without great injury to their business; that summonses of the same extensive nature, as to the production of books and documents, had been served upon the solicitor of *Kirby* and Co. and upon three other persons, of whom one was *William Hodges*, one of the petitioners, a creditor for 18,000*l.*, and a mortgagee.

That all such seven persons are summoned to attend at the same time and place, so that if they were to attend, it was nearly certain that they must remain at Brighton, at a considerable expence, for some days; that much less expence would be occasioned if the professional advisers, who recommended such examinations, attended in

London, than if the petitioners and all the various persons are obliged to attend at Brighton. The petition prayed, that an auxiliary commission for the examination of witnesses on oath, might issue to commissioners in London; and that the different persons summoned, or who might be summoned, might be examined before such commissioners, or that the commission might be renewed to commissioners in London.

1829.

Ex parte
KIRBY
and others.
In the matter
of
POTTINGER.

Mr. *Sugden* and Mr. *Montagu* for the petition: —

By 6 Geo. 4. c. 16. s. 20. an auxiliary commission may be issued for proof of debts under 20*l.*, and for the examination of witnesses on oath, and may compel the production of books, papers, &c. (a) The evil before this statute was, that the Lord Chancellor, not having any power to issue an auxiliary commission to examine parties at a distance, as examinations were attended with great and unnecessary expence, and parties put to great inconvenience. The clause in question, on which this application was founded, was introduced to remedy this evil.

Mr. *Horne* and Mr. *Anderdon* *contra*: —

The clause is limited to witnesses, and does not extend either to the bankrupt or to parties. The words are merely, “ for the examination of witnesses on oath.”

(a) 6 Geo. 4. c. 16. s. 20. “ And be it enacted, that it shall be lawful for the Lord Chancellor to direct an auxiliary commission to issue for proof of debts under twenty pounds, and for the examination of witnesses on oath, or for either of such purposes; and the commissioners in every such commission issued for the examination of witnesses shall possess the same powers to compel the attendance of and to examine witnesses, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as are possessed by the commissioners in any original commission: provided always, that all such examinations of witnesses under such commissions shall be taken down in writing, and shall be annexed to and form part of the original commission.”

1829.

Mr. Sugden in reply :—

Ex parte
KIRBY
and others.
In the matter
of
POTTINGER.

In the construction of this, as of all acts of parliament, the reason that induced the legislature to interpose must be considered in the interpretation of the words. The persons examined under commissions of bankruptcy are generally creditors to whom preference has been made, or persons to whom property has been transferred; and if the act does not extend to such persons, the provision is nugatory. That it was intended to apply to parties, appears from the authority, given in the conclusion of the clause, to enforce the production of books, deeds, papers, writings, and other documents; a provision which, as far as it is applicable to mere witnesses, is almost useless, as the examination cannot be read in evidence in any suit.

The VICE-CHANCELLOR :—

The principle upon which auxiliary commissions are issued is to facilitate the examination of creditors, and the proof of debts under 20l. This is effected by the 20th section of the act which applies to creditors; whilst the 33d and 35th clauses apply to persons suspected of being debtors of the estate. The petition represents that for the personal convenience of the petitioners, it will be desirable to have the proposed examination conducted in London. The question, therefore, resolves itself into one of jurisdiction, and my doubt is, whether it is within the purview of the statute. The petitioners are parties who claim debts under this commission, and I cannot consider them as "*witnesses*" within the intended meaning of the bankrupt statute. The application must therefore be refused. The question of costs to stand over.

Ordered accordingly.

In the matter of DAVIDSON.

THIS commitment was made previously to the passing of the 6 Geo. 4. c. 16. and stated as follows: " We did reduce and take down in writing the final examination of *J. Davidson* before us the said commissioners, which examination, so taken down in writing, was read over to him, and to the wording or stating of which said examination he the said *J. Davidson* declared he had no objection, notwithstanding which the said *J. Davidson* hath refused to sign or subscribe such examination so reduced and taken down in writing as aforesaid, though required by us so to do. These are therefore to will, require and authorize you, &c. to receive the said *J. Davidson* into custody, and him safely to keep until such time as he shall *submit* himself to us, &c. and shall sign or subscribe the examination aforesaid according, &c.

L. C.
LINC. INN,
March 20,
1830.

A warrant of commitment, after reciting an examination of the bankrupt, and that he refused to sign or subscribe such examination, proceeded as follows: " These are therefore to require and authorize you, &c. to receive the said, &c. into your custody, &c. until such time as he shall *submit* himself to us, &c. and shall sign or subscribe the examination aforesaid, according, &c." Held that the submission was properly confined to the refusal to sign, and that the warrant was not informal.

The *Solicitor General* and Mr. *Montagu* moved to discharge the prisoner, upon the authority of *ex parte Leake*, 9 B. & C. 234., in which case the warrant stated that the commissioners did cause the examination of *Leake* to be taken down and reduced into writing and read over to him, to which examination, so taken down and reduced into writing, and read over as aforesaid, *Leake* did refuse to sign and subscribe his name; they therefore willed and required that the bankrupt should be taken to prison, &c. and delivered to the keeper, &c. who was thereby authorized to receive *Leake* into his custody, and him safely to detain and keep, &c. until such time as he should submit himself to them the commissioners, and full answer make to their satisfaction, to all such questions as should be put to him, and sign and subscribe such examination as aforesaid, &c.

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 ———
 In the matter
 of
 DAVIDSON.

The Court of King's Bench held this conclusion to be bad. Mr. J. *Bayley* says, "I think the warrant is bad, because the conclusion is improper. If the language of the conclusion be such as to authorize the bankrupt to be detained in custody longer than by law he is liable to be detained, the commitment will be bad. It ought to have a conclusion pursuant to the act of parliament." And in the conclusion of his judgment the same Judge says, "The form of the concluding part of the warrant should have been, that he be committed until he sign the examination."

In the present case the conclusion would have been proper if it had been, "until he shall sign or subscribe the examination." The preceding words, therefore, "until such time as he shall submit himself to us," are either surplusage, which cannot be assumed, or must relate to some other cause of commitment not stated in the warrant.

The LORD CHANCELLOR: —

The words of the statute (5 Geo. 2. c. 30. s. 16.), under the authority of which the prisoner was committed, are as follows: "In case any such bankrupt or other person shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners all lawful questions put to him by the said commissioners, as well by word of mouth as by interrogatories in writing, or shall refuse to sign or subscribe his examination so taken down or reduced into writing as aforesaid, it shall be lawful to and for the commissioners to commit him to prison until such time as such person shall submit himself to the said commissioners, and full answer make to the satisfaction of the said commissioners to all such questions as shall be put to him as aforesaid, and sign and subscribe such examination as aforesaid, according to the true intent and meaning

of this act." The submission is either, 1st, to make full answer, or 2dly, to sign the examination. The submission is applicable to either case; in *ex parte Leake*, where it ought to have been confined to one, viz. the refusal to sign, it extended to both. But in the present case it is properly confined to the refusal to sign or subscribe.

The prisoner was remanded.

1830.

In the matter
of
DAVIDSON.

Ex parte DODGSON. — In the matter of
KENDALL.

July 28,
1830.

T. KENDALL agreed with *Elizabeth Kendall*, that if she would lend him 400*l.*, and be surety for him for 3,600*l.*, she should share the profits of a partnership, into which he was about to enter with *Ames* and *Atkinson*, and into which he was to bring 4,000*l.*

An agreement to share the profits of a member of a firm constitutes a debt proveable against the member for the share.

She performed her part of the agreement. She was not called upon to pay any part of the 3,600*l.* for which she was surety, and the 400*l.* was repaid.

The concern turned out very profitable. *T. Kendall's* share of the profits was 10,000*l.*

A commission afterwards issued against him.

She applied to prove 5,000*l.* The proof was rejected by the commissioners. Their decision was reversed by the Vice-Chancellor; and from his Honour's judgment this appeal was presented.

Mr. *Rose* for the petition of appeal.

Mr. *Montagu* and Mr. *Rogers* for the creditor.

If the mother had not advanced a farthing, but had agreed to share the profits, she, from her liability to the losses, would have been entitled to her share. She

1830.

Ex parte
DODGSON.
In the matter
of
KENDALI.

cannot, therefore, be in a worse situation, because she advanced 400*l.*, and was surety for 3,600*l.*, which happened to have been paid, but might have been lost: and the liability between the petitioner and the bankrupt is not affected by this being a sub-partnership. *Ex parte Barrow*, 2 *Rose*, 254; and *Brey v. Fromont*, 6 *Mad.* 6.

The order of the Vice-Chancellor was confirmed.

July 31,
1830.

General order
as to affidavit
upon issuing
country com-
mission to be
reconsidered.

Ex parte WHITE. — In the matter of HEYWARD.

THE petition stated, that an affidavit had been made for a country commission, as follows: —

A. B. of, &c., maketh oath, that there are not two practising barristers resident within twenty miles of, &c.

That, when such attorney swore such affidavit, he well knew that there was one practising barrister within twenty miles, and that this affidavit was made for the purpose of excluding such barrister, the commission having been issued to five attorneys.

Mr. Montagu for the petitioner.

Mr. Knight, contra.

The LORD CHANCELLOR said the petition was presented too late. It was dismissed without costs, his Lordship saying, that it appeared to him to be an evasion of the order; and that such evasions should, by reconsidering the general order, be guarded against in future.

DIGESTED INDEX

OF THE

CASES IN THIS VOLUME,

And of the

CONTEMPORANEOUS CASES

DECIDED IN THE COURTS OF LAW.

ABATEMENT.

1. A commission having issued on the petition of four partners, one of whom died before the date of the *fiat* and of the commission, it was ordered to be superseded forthwith, with liberty to the surviving partners to lodge new docket papers and issue another commission. Ex parte *Wakefield*, 1 Mont. & Maca. 291.

2. Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick v. Masson*, 1 Sim. 501.

ABSENTING.

See ACT OF BANKRUPTCY, 1, 2, 3, 4.

ACQUIESCENCE.

See SUPERSEDEAS, 6, 7, 8, 9.

ACT — BANKRUPT.

Sections retrospective, 54, 55, 56. 72. 82. Ex parte *Grundy*, 1 Mont. & Maca. 293. See ANNUITY, 2.

Sections not retrospective, 73. 92. 132. Ex parte *Shepherd*, 1 Mont. & Maca. 67.

See ASSIGNEES, 24. BANKRUPT ACT, 2. EVIDENCE, 2.

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See BANKRUPT ACT, 1, 2.

ACT OF BANKRUPTCY.

Absenting.

1. If a creditor call by appointment upon his debtor, who is in extreme distress, and he see the debtor, who immediately leaves the room, and the jury find that he left the room with intent to delay the

H H 3

creditor, the Court will not disturb the verdict. *Charrington v. Brown*, 11 B. M. 341.

2. The absenting from any place is an act of bankruptcy. *Cambridge v. Anderson*, 1 C. & P. 213.; *Hallen v. Homer*, 1 C. & P. 108.

3. If bankers close the doors and windows of the bank, and their customers cannot obtain admission, it seems to be an act of bankruptcy by absenting. *Comming v. Bailey*, 6 Bing. 365.

4. If a country banker go to London, when there is a run upon the bank, to obtain money to meet the pressure; but after his exertions fail, he remains in London to avoid his creditors, it is an act of bankruptcy, by absenting. *Comming v. Bailey*, 6 Bing. 370.

Fraudulent Deed.

5. The execution by the debtor of a deed of trust, which is an act of bankruptcy, is not in the nature of an escrow before it is executed by the trustees. *Simpson v. Sikes*, 6 M. & S. 312.

6. An assignment by bankers, in failing circumstances, and who had stopped payment, of all their estate and effects to trustees for the benefit of their creditors, is an act of bankruptcy, although the assignment be made merely for the purpose of making an act of bankruptcy. *Simpson v. Sikes*, 6 M. & S. 295.

Preference.

7. It has been ruled, that a gift of money is not within section 73. *Abell v. Daniell*, 1 Moody & M. 371.

8. If a trader give a bill of sale of his own will, and not on pressure or demand, but when he is in such a situation that he must be supposed to anticipate that a bankruptcy will

in all human probability follow, it is, it seems, an act of bankruptcy. *Gibbins v. Phillips*, 7 B. & C. 529.

9. If a builder is employed in building on the land of a proprietor, and, upon disagreeing as to the construction of the contract, the proprietor claims to consider the builder as a debtor, on account of certain advances made to him to an extent which the builder denies, and the builder's son, who principally manages the work, removes goods to the premises of a person who supplied some of the materials used, for safe custody, and to secure them from being taken by the proprietor, and the builder approves the discontinuance of the works, but did not direct or know of the removal of the goods, it is not an act of bankruptcy. *Cotton v. James*, 1 Moody & M. 277.

10. The fraudulent delivery or transfer of a bill of exchange is an act of bankruptcy. *Comming v. Bailey*, 6 Bing. 363.

11. If a trader fraudulently inclose in a letter to a creditor a bill of exchange, it is an act of bankruptcy without evidence that the bill ever came to the hands of the creditor, or that he would have accepted it. *Comming v. Bailey*, 6 Bing. 369.

Keeping House.

12. If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. *Bleasby v. Crossley*, 2 C. & P. (N.P.) 213.

13. A denial to a clerk of a creditor, who only asks to see the debtor, but does not ask for money, is an act of bankruptcy, if in fact the clerk did, to the knowledge of the debtor, call for money. *Hughes v. Gilman*, 10 B. M. 480; 2 Carr. & P. (N.P.) 32.

14. A denial at a late hour, after retirement to rest, is not an act of bankruptcy. *Ibid*.

15. If a trader hear himself denied to a creditor by one of his family, and he do not come forward, and his remaining quiescent is from an intention to delay the creditor, it has been ruled that it is an act of bankruptcy. *Smith v. Moon*, 1 Moody & M. 458.

16. If a person call at a trader's and desire to see the trader, and that he may be told that a bill is dishonoured; and upon the message being communicated to the trader, he desires his servant to say that he is not in town, and he then conceals himself, he commits an act of bankruptcy, if he consider the person who called to be a creditor. *Bleasby v. Crosby*, 2 C. & P. 213.

17. An act of bankruptcy by beginning to keep house may be by closing the doors without change of place or denial of creditors. *Comming v. Bailey*, 6 Bing. 369.

18. If bankers close the doors and windows of the bank, and their customers cannot obtain admission, and the jury find that they are so closed to exclude the customers, and the bankers remain within, it is an act of bankruptcy by beginning to keep house. *Comming v. Bailey*, 6 Bing. 365.

19. It has been ruled, that a denial to a creditor by a debtor, at his dwelling house, at a short distance from London, is an act of bankruptcy, although the debtor is

always accessible at his place of business in London. *Park v. Prosser*, 1 C. & P. 176. Per Abbot, C. J.

20. If a debtor, who is always accessible to his creditors at his place of business in London, declines to see his creditor upon his applying in the country to see him, the answer ought not to be, "that he is not at home," but "that he attends to business only in London." *Park v. Prosser*, 1 C. & P. 176. Per Abbot, C. J.

Lying in Prison.

21. The act of bankruptcy by lying in prison does not relate to the first day of imprisonment. *Moser v. Newman*, 6 Bing. 556; *Higgins v. M'Adam*, 3 Y. & J. 1.

22. In the act of bankruptcy by lying in prison two months, the first and last days must be included to constitute the twenty-one days. *Higgins v. M'Adam*, 1 Y. & J. 1.

Time of committing.

23. The act of bankruptcy may be committed after the trading has ceased. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

24. An act of bankruptcy committed before the 6 G. 4. c. 16. took effect, will not support a commission issued after that time. *Hewson v. Heard*, *Palmer v. Moore*, 9 B. & C. 754.

25. The act of bankruptcy may be between the time of striking the docket and the issuing of the commission. *Simpson v. Sikes*, 6 M. & S. 312.

26. If a trader commit an act of bankruptcy upon which a commission might be issued under the statutes then in force; but which are repealed, and the repealing statute is repealed, it is sufficient to

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support a commission issued after the repeal of the repealing statute. *Phillips v. Hopwood*, 10 B. & C. 38.

By Member of Parliament.

27. To prove an act of bankruptcy, by a trader who is a member of parliament, by his not paying or securing to a creditor a debt of 100*l.*, it may be shewn that he was a creditor without calling him as a witness. *Burton v. Green*, 3 C. & P. 306.

Evidence.

28. The affidavit upon striking a docket is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

29. In an action by the assignees of a bankrupt communications made by the bankrupt to his attorney may be given in evidence to prove the act of bankruptcy, if the bankrupt consents, and it does not lie in the mouth of the defendant to take the objection to their disclosure. *Merle v. Moore*, 2 C. & P. (N.P.) 275.

30. It has been ruled, that the declarations by a trader, upon his return home, that he had gone away for the purpose of avoiding a writ, is evidence of an act of bankruptcy, without any evidence that a writ had issued, or that he was indebted. *Newman v. Stretch*, 1 Moody & M. 338.

31. If the only evidence on the proceedings of the act of bankruptcy is the evidence of the bankrupt, and no objection is made at the trial, it is not any ground for a new trial. *Jacobs v. Latour*, 2 B. M. 203; 5 Bing. 131.

General.

32. A man cannot commit an act of bankruptcy by the conduct of

his agent, without his knowledge. *Cotton v. James*, 1 Moody & M. 277.

33. The opinion that an act of bankruptcy is a crime no longer prevails. *D. Tindal, C. J. Comming v. Bailey*, 6 Bing. 371.

See EVIDENCE.

Act of Bankruptcy in India.

See INDIA.

ACTION.

If, in an action to try the validity of the commission, there is a plea of bankruptcy, and the replication, protesting the debt and the trading, deny that the plaintiff did become bankrupt, the issue is merely as to the act of bankruptcy. *Cotton v. James*, 3 C & P. 512.

Limitation of.

See ASSIGNEES, 13, 14.

AFFIDAVIT.

1. Affidavit verifying proceedings at law not evidence, and taken off the file, with costs. *Ex parte Barnes*, 1 Mont. & Maca. 9.

2. The provision in the statute requiring an affidavit, on striking a docket, that the party is bankrupt, is directory only, and the commission would be valid without any such affidavit. *Simpson v. Sikes*, 6 M. & S. 311.

See DOCKET, 2.

ALLOWANCE.

1. Where A., being one of three partners, had paid 20*s.* in the pound on his separate estate, and 12*s.* 6*d.* in the pound had been paid on the joint estate, but on the separate estates of the two other partners a sufficient dividend had not been paid: Held, that under the 6 Geo. 4. c. 16. s. 128. & 129., A. was entitled, for his sole use, to an allowance of five per cent. not exceeding 400*l.* Ex parte *Minchin*, 1 Mont. & Maca. 135.

2. The allowance is not payable until a final dividend has been made. Ex parte *Minchin*, 1 Mont. & Maca. 135; and ex parte *Surridge*, 1 Mont. & Maca. 287.

3. Where a commission had issued in 1815, and it was stated in the petition that a final dividend had been advertised in June 1827, the bankrupt's allowance was ordered to be paid, although it was admitted at the bar that there was still some reversionary property, but of small amount, to be realized. Ex parte *Davis*, 1 Mont. & Maca. 36.

4. Where the bankrupt's right to an allowance vested before the 1st of September 1825: Held, that he was only entitled to the amount directed to be paid by the 5 G. 2. c. 30. s. 7. Ex parte *Ruck*, 1 Mont. & Maca. 297.

 AMENDMENT OF COMMISSION.

See COMMISSION, 3.

 APPEAL.

See COSTS, 5. REHEARING.

ANNUITY.

1. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees. *Graves v. Dolphin*, 1 Simons, 66.

2. The clauses in the 6 Geo. 4. c. 16. (ss. 54 & 55.), respecting annuities, have a retrospective operation. *Bell v. Bilton*, 4 Bing. 615; 1 M. & P. 574.

3. Before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners although the annuity was granted, and the grantor became bankrupt previously to September 1825. *Bell v. Bilton*, 4 Bing. 615; 1 M. & P. 574.

4. A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan*, 3 Russ. 421.

 APPROPRIATION.

1. At a dividend meeting under a commission against A., a claim was entered on behalf of B., and a sum ordered to be appropriated in the hands of C., the sole assignee, to answer eventually the amount of the several sums proved and claimed. But before the claim of B. was per-

fectured into a proof, C. misapplied the money so placed in his hands, and became bankrupt: Held, that B. was not entitled to recover from the estate of A. his proportion of the sum appropriated in the hands of C. and misapplied by him. Ex parte *Grant*, 1 Mont. & Maca. 77.

ARBITRATION.

1. Whether, in general, bankruptcy revokes submission to arbitration is not settled. Per Lord Tenterden, *Marsh v. Wood*, 9 B. & C. 664.

2. If one of two parties who have submitted disputes to arbitration become bankrupt, if all his interest in the matters in dispute pass to the assignees, the other may revoke the submission, without being liable to an action. *Marsh v. Wood*, 9 B. & C. 664.

ARREST.

1. If proceedings are commenced against bail, whose principal has become bankrupt, and their surrendering the bankrupt will be attended with expence to his estate, and inconvenience to him in making out his accounts, and passing his examination, the Court of King's Bench will enlarge the time for the bail to surrender the bankrupt. *Offley v. Dickens*, 6 M. & S. 349.

2. A bankrupt may be taken by his bail for the purpose of rendering him, notwithstanding his privilege from arrest; and if they neglect to take him they may be fixed. *Payne v. Spencer*, 6 M. & S. 237.

See ELECTION.

ASSIGNEES.

Election of.

1. The rejection by commissioners of an assignee as unfit, under 6 Geo. 4. c. 16. s. 61., is not final: An appeal lies to the Lord Chancellor. Ex parte *Candy*, 1 Mont. & Maca. 197.

2. Where, at the election of assignees, the major part in value of the creditors had been, accidentally, and without default on their parts, excluded from voting, a new choice of assignees was directed to be made. Ex parte *Dechapeaurouge*, 1 Mont. & Maca. 174.

3. Adverse interest by an elector is not a reason for rejection of the elected. Ex parte *Candy*, 1 Mont. & Maca. 198.

4. Adverse interest in the elected when it amounts to unfitness. Ex parte *Candy*, 1 Mont. & Maca. 198.

5. An assignee ought not to be solicitor to the commission. Ex parte *Badcock*, 1 Mont. & Maca. 231.

Responsibility.

6. Assignees of a bankrupt not responsible for a loss sustained in the disposal of the bankrupt's effects, where, under the circumstances, it could be inferred that there had been no blameable negligence in their conduct. Ex parte *Turner*, 1 Mont. & Maca. 52.

7. It has been ruled, that if mortgaged property is sold with the bankrupt's goods, but without the sanction of the assignees, their returning a copy of the catalogue to the excise office, with a declaration subscribed by them that the goods belong to the bankrupt, for the purpose of exempting the goods from auction duty, it is not an adoption of the sale by the assignees.

nees. *Bleaden v. Hancock*, 1 Moody & M. 466.

Election as to Property.

8. If a lessee become bankrupt, the term remains vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provisions of 6 G. 4. c. 16. s. 75. *Tuck v. Fyson*, 6 Bing. 330.

Buying the Estate.

9. Leave given to assignees to bid for part of the bankrupt's estate, a meeting of the creditors having previously given their sanction to the application. *Anonymous*, 2 Russ. 350.

10. An assignee, under particular circumstances, permitted to bid at the sale of the bankrupt's estate, his solicitor not having the management of the sale. *Ex parte Morland*, 1 Mont. & Maca. 76.

11. An agreement, by which a person is enabled to buy property of the bankrupts at a certain sum, on giving the bankrupt a specific sum is void, unless, as it seems, a communication is made to all the creditors; but a communication to the assignees alone is not sufficient. *Macshane v. Gill*, 1 C. & P. 149.

12. The assignees of a bankrupt may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate; and even in relinquishing the bankrupts' interest therein as a *damnosa hereditas*; but however pure their motives, neither assignees nor commissioners can be permitted to possess themselves, by purchase or otherwise, of any part of the bankrupts' interest in such property. Against all transfers of the bankrupts' estate,

either to the assignees or commissioners, the rule of the Court is uniform and inflexible. *Ex parte Badcock*, 1 Mont. & Maca. 231.

Actions and Suits by and against.

13. An action need not be commenced against an assignee within three months after the cause of action. *Carruthers v. Payne*, 5 Bing. 270.

14. The right construction of 6 G. 4. c. 16. s. 44. as to the time within which an action must be commenced, appears to be, that if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, this is not done in pursuance of the statute, and he is responsible for it. Per Bayley, J. *Edge v. Parker*, 8 B. & C. 701.

15. If, after a known act of bankruptcy, a person take possession of the stock in trade and continue the business, and after a commission has issued, he pay the balance upon the debtor and creditor account to the messenger, who duly pays and accounts to the assignees, by whom it is accepted, the assignees cannot afterwards treat him as a wrong doer, and maintain trover against him. *Brewer v. Sparrow*, 7 B. & C. 310.

16. The assignees may maintain trover for a bill of exchange, which the bankrupt transferred after his bankruptcy, upon which the bankrupt had a lien for a part of the amount. *Hall v. Barnard*, 1 C. & P. 382.

17. Trover will lie against the assignees, under a commission against a banker, for the proceeds of short

bills received by the assignees after the bankruptcy. *Tennant v. Strachan*, 1 Moody & M. 378.

18. If a right of entry is vested in husband and wife in right of the wife, the assignees of the husband may recover the freehold by a writ of entry. *Michell v. Hughes*, 6 Bing. 696.

19. A demurrer does not lie to a bill by assignees, on the ground that it does not state the suit to be instituted with consent of the creditors or of the commissioners. *Jones v. Yates*, 3 Y. & J. 373.

See TROVER.

Evidence in Actions by.

20. In an action by assignees against a debtor, the bankrupt's attorney may be examined as to communications made by the bankrupt at the time of preparing a deed which is relied on as the act of bankruptcy, if the bankrupt does object; and it does not lie in the mouth of the defendant to take the objection. *Merle v. Moore*, 2 C. & P. 275.

21. If a witness, on being examined before commissioners, do not bring his books with him, but while under examination consents that the accountant shall examine his books, and compare them with an extract from the bankrupt's books, the accountant cannot be examined as to the dealings with the bankrupt from the inspection of the books, without also reading the examination before the commissioners. *Yates v. Carnes*, 3 C. & P. 100.

22. In assumpsit by the assignees for money paid by the bankrupt after the bankruptcy, where there is not a count for money had and received to the use of the assignees, the plaintiffs cannot recover on the

count for an account stated with the assignees, where the defendant, in an examination before the commissioners, admits that he has received a sum, but does not acknowledge it as a debt; and it seems doubtful whether he could recover even if he had acknowledged it. *Tucker v. Barrow*, 3 C. & P. 85.

23. It has been ruled, that in trover against a person who holds property as an assignee, the requisites to prove the commission need not be proved, unless there has been notice to dispute the commission. *Newport v. Hollings*, 3 Carr. & P. 223.

24. Section 92. has not a retrospective operation. *Key v. Goodwin*, 6 Bing. 576.

25. It has been ruled, that it is not a sufficient ground for the postponement of a trial, that the bankrupt is an important witness, and will shortly be competent, by the Chancellor's allowance of his certificate, which has been signed by the commissioners. *Tennant v. Strachan*, 1 Moody & M. 378.

26. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees. Query, whether an admission, obtained by such compulsory examination, can be used as evidence in such an action? *Tucker v. Barrow*, 7 B & C. 623.

27. Examinations of parties before commissioners of bankrupt, unless obtained by imposition or under duress, may be received in evidence against them in actions by

the assignees. *Robson v. Alexander*, 1 M. & P. 448.

28. If, upon an application made by the collector for the assignees to a debtor of the bankrupt, the debtor knowing that the collector came from the assignees, says, "I will call and pay the money;" such promise is an admission of the rights of the assignees, and renders it unnecessary to prove the requisites in support of the commission. *Pope v. Monk*, 2 Carr. & P. (N. P.) 112.

29. In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623.

30. It has been ruled, that in an action by assignees to recover sums paid by the bankrupt in preference, letters, received by the bankrupt from a person to whom he had applied for an advance, are evidence to the extent that the assistance was refused. *Vacher v. Cocks*, 1 Moody & M. 355.

31. It has been ruled, that in an action by assignees to recover sums paid by the bankrupt in preference, declarations made by the bankrupt about the time of the transaction, but not accompanying any act, as to his circumstances, are admissible to shew under what circumstances and why the payment was made. *Vacher v. Cocks*, 1 Moody & M. 354. See *Guthrie v. Crossley*, 2 Carr. & P. 301, and *S. P. Herbert v. Wilcocks*, Bristol Summer Assizes, 1829, in note to 1 Moody & M. 355.

32. It is unsettled, whether in an action of trover by assignees, in which the bankruptcy is disputed, letters written by the bankrupt to

the petitioning creditor after the act of bankruptcy, before the commission, acknowledging a debt, can be received as evidence. *Saunders v. Leferett*, 1 Carr. & P. 46.

33. The buying goods of a trader to a great extent, for near two years, at more than 90 per cent. under prime cost, is evidence of knowledge by the purchaser of the insolvency of the seller. *Yates v. Carnsew*, 3 C. & P. 100.

34. It is only in actions or suits brought by the bankrupts own assignees for a debt or demand for which he might have sued, that the depositions under a commission are made evidence. *Mushett v. Drummond*, 10 B. & C. 158.

35. The petitioning creditor's debt, trading, and act of bankruptcy, are sufficiently proved by the production of the commission and the proceedings under it, in a case where the defendant is not named as assignee on the record, provided no notice under the 49 Geo. 3. c. 121. s. 10. has been given by the plaintiff. *Roue v. Lant*, 1 Gow. 24.

Costs.

36. Extra costs, incurred by assignees of a bankrupt in conducting prosecutions for perjury and conspiracy, directed to be allowed under 6 Geo. 4. c. 16. s. 106. Ex parte *Strange*, 1 Mont. & Maca. 31.

See Costs, 1.

Accounts of.

37. Creditors are not entitled to apply to the Court for an order, to have copies of the assignees accounts delivered to them. They are entitled, under the 6 Geo. 4. c. 16. s. 101., to inspect such accounts, and for that purpose an

application must be made, in the first instance, to the commissioners. Ex parte *Granger*, 1 Mont. & Maca. 289.

Charging 20 per Cent.

38. Interest at twenty per cent. cannot be recovered on the common money counts, unless the commissioners have settled an account, and charged the assignee with interest. *Beresford v. Birch*, 1 C. & P. 373.

ATTESTATION.

1. Unless the person attesting the signatures of the petitioners, under the general order of August 1809, be the solicitor actually presenting the petition, he should state himself in the attestation to be the attorney, solicitor, or agent of the party signing in the matter of the petition. Ex parte *Clapham*, 1 Mont. & Maca. 51.

2. The signature of a petitioner attested in the following terms: "I attest this to be the signature of the said A. Caldecott; W. H. Ashurst, his solicitor, in the matter of this petition," is a sufficient compliance with the general order of the 12th of August 1809. *Semble*, that the word "*authenticate*" would also be sufficient. Where a petition was presented by one of four assignees, describing himself as "acting assignee," and stating the absence of two of his co-assignees, the petition was permitted to proceed. Ex parte *Caldecott*, 1 Mont. & Maca. 493.

AUCTION DUTY.

It seems that a sale by a mortgagee of the bankrupt's property is not liable to the auction duty. *Bleaden v. Hancock*, 1 Moody & M. 466.

BAIL.

If a bankrupt obtain his certificate between issue and judgment, the Court will not, upon an application by the bail, after judgment, enter an *exoneretur* on the bail-piece. *Humphreys v. Knight*, 6 Bing. 569.

See ARREST, 1, 2.

BANK OF ENGLAND ACT.

See DEBT PROVEABLE, 2.

BANKRUPT.

Petition that a bankrupt be compelled to convey under 6 Geo. 4. c. 16. s. 78. refused, until he could have an opportunity of trying the validity of the commission. Ex parte *Thomas*, 1 Mont. & Maca. 64.

See JURISDICTION, 1. INDIA.

BANKRUPT ACT.

1. The word *delivery* in sect. 3. is of very general signification, but being connected with the words gift or transfer, it seems that in inter-

pretation it must be confined to transactions of the same nature. Per Lord Tenterden. *Cotton v. James*, 1 Moody & M. 277.

2. Section 73. has not a retrospective operation. *Wombwell v. Laver*, 2 Sim. 360.

BRICKMAKER.

See TRADING, 3. 6. 8.

BUYER AND SELLER.

See TRADING, 1, 2, 3, 4. 7, 8. 9. 11.

CERTIFICATE.

See ANNUITY, 3. BAIL.

Debts barred by.

1. An attorney, in custody, when a commission issues against him, upon an attachment for nonpayment of money, is discharged by his certificate. *Rex v. Edwards*, 9 B. & C. 652.

2. If a creditor sue a surety on a guarantee, and the principal debtor become bankrupt, and the creditor prove the debt; and the surety give notice to the creditor that, though he does not admit his liability as surety, he shall, if the creditor sign the certificate, hold himself altogether discharged; and, after issue joined in the action, but before trial, the creditor sign the certificate, which, without such signature, the bankrupt could not obtain, and the certificate is allowed, and the creditor obtain

judgment in the action, the surety is not discharged from his liability. *Browne v. Carr*, 2 Russell, 600.

3. The Court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having, after the receipt of the money, become bankrupt, and obtained his certificate. *Culliford v. Warren*, 8 B. & C. 220.

4. If the owner of bank stock give to a stock-broker a power of attorney to sell, with orders not to sell without directions, and the broker sells the stock without the knowledge of the owner, and conceals the sale till a commission issue against him, his certificate is not a bar to an action in tort. *Parker v. Crole*, 5 Bing. 63.

5. A demand for goods bargained and sold, to be delivered at a future day, which is after the commission, is not barred by the certificate of the vendee. *Boorman v. Nash*, 9 B. & C. 145.

6. In May 1825, a plaintiff obtained a verdict for damages, subject to an award; and on the 7th of January 1826, a commission of bankruptcy issued against the plaintiff. On the 26th of January the arbitrator made his award, and ordered the plaintiff to pay a sum to the defendant, with the costs of the award and of the reference, which on the 21st of April 1826, were taxed and judgment of nonsuit signed: Held, that the costs did not constitute a debt proveable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Harwell v. Thorogood*, 7 B. & C. 705.

7. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of next term, but before final judgment was signed, became bankrupt:

Held, that final judgment, signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway v. Fisher*, 7 B. & C. 436.

Mode of obtaining Discharge.

8. A bankrupt obtained his certificate on the 13th of November; and on the same day a *fiery facias* was executed on his goods; the Court refused relief on motion. *Hanson v. Blakey*, 4 Bing. 493.

9. If a bankrupt obtain his certificate between issue and judgment, and he does not plead his certificate, *puis darrein continuance*, he may be discharged. *Humphreys v. Knight*, 6 Bing. 569—572.

General.

10. An acknowledgment of a debt by one of two partners, made after he has obtained his certificate, is not sufficient to take the case out of the statute of limitations, so as to charge the other partner. *Martin v. Bridges*, 3 C. & P. 83.

11. A bill given to a creditor to induce him to sign the certificate is void; but if it is given merely to prevent opposition to the certificate, it is good in the hands of a *bona fide* holder, without notice. *Birch v. Jervis*, 3 C. & P. 379.

12. Where a creditor who has proved is fully paid by the surety, he cannot afterwards sign the certificate. *Ratcliffe v. Gunson*, 6 Mad. 193.

13. A general plea of bankruptcy under the statute must pursue the terms of the statute and conclude to the country. *Sheen v. Garrett*, 6 Bing. 686.

14. If before declaration in an action of debt, the plaintiff is in-

formed that one of the defendants is a bankrupt, and has obtained his certificate, and no step is taken by the plaintiff to discharge the bankrupt, until he has pleaded his bankruptcy and certificate, and ruled the plaintiff to reply, and a replication is filed as to the other defendant, and a *nolle prosequi*, as to the bankrupt he is not entitled to his costs, under 8 Eliz. c. 2. s. 2. *Booth v. Middlecoat*, 6 Bing. 445.

CHOSE IN ACTION.

A trustee under the 54 Geo. 3. c. 137. (Scotch bankrupt act) cannot sue in his own name for a chose in action. *Jeffery v. M'Taggart*, 6 M. & S. 126.

COMMISSION.

Description in.

1. Where the bankrupts were described as "late of the Kent Road, coal merchants," and it appeared that they had quitted that trade in 1826, and had since been separately engaged in farming: Held, that the description was insufficient, and that the commission should be superseded. *Ex parte Day*, 1 Mont. & Maca. 208.

2. If a trader, in a commission of bankruptcy issued against him, is described as a money scrivener only. It is, nevertheless, competent to a plaintiff to support the commission by proof of any species of trading, notwithstanding the omission of the general words, "dealer and chapman." *Smith v. Sandilands*, 1 Gow. 171.

3. Where, after the opening of the commission, the name of the bankrupt had been erroneously altered by the clerk of the solicitor, the Lord Chancellor refused to allow the commission to be amended, and directed that it should be superseded. In the matter of *Stammers*, 1 Mont. & Maca. 290.

4. Parties claiming debts, and summoned to attend, in the country, for examination under a commission of bankrupt, are not "*witnesses*" within the meaning of 6 Geo. 4. c. 16. s. 20., so as to entitle them to an auxiliary commission for their examination. Ex parte *Kirby*, 1 Mont. & Maca. 440.

See SECOND COMMISSION. NOTICE TO DISPUTE.

COMMISSIONERS.

1. The Court will not assume that commissioners of bankrupt are likely to exceed the authority vested in them. Where a mortgagee of the bankrupt's property, who was summoned to attend before the commissioners, petitioned that they might be restrained from requiring the production of the mortgage deed, the petition was dismissed with costs, as being premature. Ex parte *Beeston*, 1 Mont. & Maca. 244.

2. When commissioners take more than the statutable fees, the commission will be renewed to other commissioners. Ex parte *Kirby*, 1 Mont. & Maca. 405.

3. On an application by a person against whom a commission of bankrupt had issued, that counsel might be permitted to attend the commissioners, on his behalf, before adjudication, the Lord Chancellor

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declined to make any order, but intimated his opinion, that, under the circumstances, it would be proper for the commissioners to comply with the request. Ex parte *Taylor*, 1 Mont. & Maca. 427.

COMMITMENT.

1. Commissioners of bankrupt are not empowered to dispense with the rule of law, by which a party is protected from criminating himself. Ex parte *Kirby*, 1 Mont. & Maca. 212.

2. If a witness refuse to produce his books, or a copy to refresh his memory, so that he may be enabled to answer such questions as, without reference to his books, he cannot answer, he may be committed for not answering satisfactorily. In the matter of *Dale* and *Hardy*, 1 Mont. & Maca. 271.

3. It has been intimated, that a commitment which does not set out all the questions is not bad, if it appear on the warrant that the prisoner did not make any objection to the questions, or that the prisoner has answered all questions put to him. Ex parte *Leake*, 9 B. & C. 236.

4. When a return is defective by not fully stating the warrant, the judge may ask the gaoler in court whether the warrant is or is not fully set forth, or the whole of the warrant may be set forth by the affidavit of those who oppose the prisoner's discharge. In re *Power*, 2 Russell, 584.

See HABEAS CORPUS. EXAMINATION, 1, 2.

COMPOSITION.

1. All that is enacted by the 6 Geo. 4. c. 16. s. 133. is, that when a certain proportion of the creditors agree to take a composition, the chancellor may supersede. It does not at all interfere with the rights or securities of persons not parties to the agreement. Per Lord Tenterden. *Tuck v. Tooke*, 9 B. & C. 437.

2. If a debtor agrees to assign all his property in trust for his creditors, upon the usual covenants, and to be void if not signed before a given day by all the creditors, and the trustees sell the property and pay ten shillings in the pound, and a creditor, who has not executed within the time mentioned, will execute:—an action cannot be maintained by a creditor who has executed, until it is ascertained that the other creditor will not execute. *Tatlock v. Smith*, 6 Bing. 339.

3. If, after a commission has issued, it is agreed between the creditors and a friend of the bankrupt's, that the funds shall be vested in a trustee, who shall give his note for 5s. in the pound, and the commission not to proceed, but the agreement to be void in case any of the creditors to the amount of 10l. refuse within fourteen days; and the notes are given: but a creditor refuses to execute, and the commission proceeds; the notes cannot be enforced by a creditor. *Enderby v. Corder*. 2 C. & P. 203.

COMPUTATION OF TIME.

See RELATION.

CONCERTED COMMISSION.

1. It has been ruled, that a commission issued at the instance and request of the bankrupt is good at law. By Lord Tenterden. *Shaw v. Williams*, 1 R. & M. 19.

2. A commission issued at the request of the bankrupt is super-sedeable. Ex parte *Gane*, 1 Mont. & Maca. 399.

3. If, at a meeting of creditors, one of the creditors dissent from the execution of a deed of assignment: Quære, whether he can issue a commission upon it? Ex parte *Bayly*, 1 Mont. & Maca. 438.

CONTINGENT DEBT.

1. In Feb. 1772, A. covenanted by his marriage settlement for the payment of 2,000l., in case his intended wife, or any issue of the marriage, should survive him. In 1803 a commission of bankrupt issued against A., under which he obtained his certificate. In Feb. 1825, A. died, leaving issue of the marriage. In May 1828, there being funds remaining for distribution amongst the creditors of A., a renewed commission was issued, and a final dividend advertised: Held, that the 6 Geo. 4. c. 16. s. 56. is retrospective in its operation; and that, although the event upon which the debt was contingent had happened after the commission issued, and before the 6 Geo. 4. c. 16. came into operation, the sum of 2,000l. was proveable as a debt under the commission. Ex parte *Grundy*, 1 Mont. & Maca. 293.

2. A demand for goods bargained and sold, to be delivered at a future

day, which is after the commission, is not proveable as a contingent debt. *Boorman v. Nash*, 9 B. & C. 145. *See ex parte Barker*, 9 Ves. 110, as to contingency not being limited to time.

COSTS.

1. The assignees, after the trial of an action, commenced by them, where it appeared that there was not a sufficient trading to support the commission, and after other acts under the commission, presented a petition to have the commission superseded, and that all costs and expences incurred might be paid by the petitioning creditor: Held, that the application came too late, and that the petitioning creditor was not responsible. *Ex parte Paul*, 1 Mont. & Maca. 185.

2. Taxed costs upon a judgment, as in case of a nonsuit, under a rule of Court, do not constitute a good petitioning creditor's debt. Such costs are recoverable only by attachment, in the nature of an execution. *Ex parte Stevenson*, 1 Mont. & Maca. 262.

Proof of.

3. Where, upon an action on a contract, there was a verdict for the plaintiff at *Nisi Prius*, subject to a reference before the bankruptcy (by which it was directed that the costs of the action should abide the event of the award), and the award was made in favour of the plaintiff after the bankruptcy, the costs were held to be proveable under the commission. *Ex parte Helm*, 1 Mont. & Maca. 70.

Taxation of.

4. Under the 6 Geo. 4. c. 16. s. 14. when a creditor is dissatisfied with the taxation of the commissioners, he must present a petition for an order of reference to have the bill settled by a master in Chancery. Without such order, the masters have no authority to retax a bill which has been taxed by the commissioners. *Ex parte Hickman*, 1 Mont. & Maca. 252.

5. An order was made by the Vice-Chancellor, and confirmed on appeal by the Lord Chancellor, that the petitioner should be admitted to prove a debt which the commissioners had rejected from an error in judgment: Held, that the costs of all parties should be paid out of the estate. *Ex parte Fiske*, 1 Mont. & Maca. 93.

See EQUITABLE MORTGAGEE.

DEBT PROVEABLE.

1. A demand for goods bargained and sold, to be delivered at a future day, which is after the commission, is not barred by the certificate of the vendee. *Boorman v. Nash*, 9 B. & C. 145.

2. A., being agent of and also a partner in the Leith Banking Company, opened an office at Carlisle, and there circulated promissory notes drawn by the company's cashier in Scotland, and made payable to the bearer, on demand, at the company's office in Leith: Held, that this was in violation of the statutes passed for the protection of the Bank of England, and that a debt founded on notes so issued, cannot be proved under a commission of bankrupt. *Ex parte Randleson*, 1 Mont. & Maca. 86.

3. In May 1825, a plaintiff obtained a verdict for damages, subject to an award; and on the 7th of January 1826, a commission of bankruptcy issued against the plaintiff. On the 26th of January the arbitrator made his award, and ordered the plaintiff to pay a sum to the defendant, with the costs of the award and of the reference, which on the 21st of April 1826, were taxed and judgment of nonsuit signed: Held, that the costs did not constitute a debt proveable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Hasswell v. Thorogood*, 7 B. & C. 705.

4. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of next term, but before final judgment was signed, became bankrupt: Held, that final judgment, signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway v. Fisher*, 7 B. & C. 496.

5. The Court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having, after the receipt of the money, become bankrupt, and obtained his certificate. *Culliford v. Warren*, 8 B. & C. 220.

6. S., by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*, on various trusts. S. became bankrupt: Held, that the 4,000*l.* was not

capable of valuation by the commissioners, and that the trustees were, therefore, not entitled to prove against the separate estate of S. within the meaning of the 6 Geo. 4. c. 16. s. 56. *Ex parte Eagle*, 1 Mont. & Maca. 422.

7. If the owner of bank stock give to a stock-broker a power of attorney to sell, with orders not to sell without directions, and the broker sells the stock without the knowledge of the owner, and conceals the sale till a commission issue against him, his certificate is not a bar to an action in tort. *Parker v. Crole*, 5 Bing. 63.

8. Where, upon an action on a contract, there was a verdict for the plaintiff at Nisi Prius, subject to a reference before the bankruptcy (by which it was directed that the costs of the action should abide the event of the award), and the award was made in favour of the plaintiff after the bankruptcy, the costs were held to be proveable under the commission. *Ex parte Helm*, 1 Mont. & Maca. 70.

9. S., by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death to any issue of the marriage; and that his heirs, executors, or administrators should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*, on various trusts. S. became bankrupt: Held, that the petitioners were entitled to prove the value of 4,000*l.*, as a contingent debt, against the separate estate of S. *Ex parte Tindall*, 1 Mont. & Maca. 415.

10. A. advanced 2,000*l.* to B., to be repaid on a day certain, and secured by the bond of C., conditioned that if B. made default in

payment on the day named, C. should pay within one week. C. became bankrupt, and B. afterwards made default: Held, that the debt was proveable under the commission against C. Ex parte *Lewis*, 1 Mont. & Maca. 426.

11. The drawer of a bill of exchange became bankrupt, and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him, for some time after the bill became due: and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. Ex parte *Rohde*, 1 Mont. & Maca. 430.

Partnership.

12. If a trader agree to purchase goods, to be delivered on a future day, which has not arrived when the commission issue, the difference between the value of the goods and the purchase money is not proveable. *Boorman v. Nash*, 9 B. & C. 145.

13. The drawer of a bill payable to his own order, but drawn by him for the accommodation of the first indorsee, is not "surety for or liable for the debt of that indorsee," within the meaning of the 49 Geo.3. c. 121. s. 8. *Mayer v. Meakin*, 1 Gow. 183.

14. An agreement to share the profits of a member of a firm, constitutes a debt proveable against the

member for the share. Ex parte *Dodgson*, 1 Mont. & Maca. 445.

15. In December 1818, A., B., C., and D. dissolved partnership as bankers, by deed, by which it was agreed that A. and B. should retire, and the business be carried on in future by C. and D. C. and D. covenanted to indemnify A. and B. against all outstanding demands. In October 1825, C. died, and a commission issued against D.; A. having been obliged to pay certain partnership debts, against which C. and D. had undertaken to indemnify him: Held, that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818. Ex parte *Carpenter*, 1 Mont. & Maca. 1.

16. If one of three partners obtain by forgery a sum from the sale of stock, which he, in fraud of his partners, pays into the banking house, and withdraws it, it is proveable against the joint estate by the stock proprietor, although he has not prosecuted or given evidence against the convicted felon. Ex parte *Bolland*, 1 Mont. & Maca. 315.

Joint against separate Estate.

17. Under a joint commission, proof ordered by the joint against the separate estate of one partner, who had appropriated partnership stock without the privity or sanction of the other partners, and afterwards retained it, with their knowledge, but under circumstances from which their subsequent approbation could not be inferred. Ex parte *Watkins*, 1 Mont. & Maca. 57.

18. In a creditor's suit for administering the assets of B., a joint creditor of A. and B. was permitted

to prove, A. having become bankrupt, and it appearing that there were no joint assets of A. and B. *Concell v. Sykes*, 2 Russell, 191.

Separate or joint Estate.

19. A. employed B. and C. as his stock-brokers, and, for the purpose of more convenient transfer, allowed certain stock, belonging to him, to stand in the name of B. alone; B., without the consent or knowledge of A., sold this stock, and paid the produce into the partnership funds of B. and C.: B. and C. having afterwards become bankrupts:—Held, that A. was entitled to prove against the separate estate of B., or against the joint estate, as he should think fit. *Ex parte Turner*, 1 Mont. & Maca. 255.

DIVIDEND.

See APPROPRIATION. SERVANT.
ORDER OF DIVIDEND.

DOCKET.

1. The correctness of the bond given on striking the docket cannot be disputed at Nisi Prius. *Folks v. Scudder*, 3 C. & P. 232.

2. The affidavit upon striking a docket is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623; 1 M. & P. 597.

ELECTION.

Two parcels of goods were sold at different times, and paid for by two distinct bills; the vendee afterwards becoming bankrupt, the ven-

dor proved under the commission for the amount of the first parcel, being then the holder of the bill given in payment for the same: the bill for the other parcel was outstanding in the hands of a party to whom it had been negotiated prior to the bankruptcy, but who had given notice of its dishonour: Held, that the vendor was not precluded, under 6 Geo. 4. c. 16. s. 59., from bringing an action against the bankrupt for the amount of the last parcel of goods; and that he would not have been precluded, even if he had been the holder of the second bill at the time of his so proving for the amount of the first parcel of goods. *Ex parte Edwards*, 1 Mont. & Maca. 116.

See PROOF, 1.

ENROLMENT.

1. The Court of Common Pleas has not authority, under the 6 Geo. 4. c. 16. s. 96., to compel parties to enrol the proceedings under a commission of bankruptcy. The application must be to the Lord Chancellor. *Johnson v. Gillett*, 5 Bing. 5; see 1 M. & M. 82.

2. There cannot now be any enrolment under 5 Geo. 2. c. 30. *Key v. Goodwin*, 6 Bing. 576.

3. An application to the Court for an order to enrol the proceedings, under 6 Geo. 4. c. 16. s. 96., must be on petition. Assignees who refuse, at the request of parties interested, to enrol proceedings, which, before the 6 Geo. 4. c. 16., they were bound to produce on a subpoena duces tecum, refuse at the peril of costs. *Ex parte Johnstone*, 1 Mont. & Maca. 82.

EQUITABLE MORTGAGE.

1. Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the ordinary and proper practice is, that he should pay the costs of the order. *Ex parte Robinson*, 1 Mont. & Maca. 261.

2. Under 6 Geo. 4. c. 16. s. 65., the equitable mortgagee of a bankrupt tenant in tail is entitled to have his lien made good as against the fee simple of premises of which the bankrupt was seised as tenant in tail. *Ex parte Wise*, 1 Mont. & Maca. 65.

3. An equitable mortgagee, by deposit of deeds without writing, exempted from paying the costs of his petition, the mortgagor having subsequently written a letter directing him to hold the deeds, after payment of his own mortgage, for a second mortgagee. *Ex parte Reid*, 1 Mont. & Maca. 114.

EVIDENCE.

1. Letters found in the bankrupt's possession are evidence to shew that he received information that the fact mentioned in the letters took place. *Cotton v. James*, 1 Moody & M. 277.

2. Section 92 has not a retrospective operation. *Key v. Goodwin*, 6 Bing. 576. *Key v. Cook*, 2 M. & P. 720.

See ACT OF BANKRUPTCY. ASSIGNEES. FRAUDS, STATUTE OF.

EXAMINATION.

1. Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between them and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Ex parte Baxter*, 7 B. & C. 673.

2. A bankrupt, under examination, being asked, whether the statements contained in a written paper, produced and shewn to him, were true statements? demurred to the question, on the ground that his answer might expose him to a criminal prosecution, and was committed for not answering: Held, under the circumstances of the case, that the bankrupt was entitled to demur to a question in so general a form. *Ex parte Kirby*, 1 Mont. & M. 212.

EXECUTION.

1. The sheriff having, under a *fi. facias*, issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the *fi. facias* until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and

not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing the goods, which consisted of the stock on a farm which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the *fi. fa.* The Court refused to stay the proceedings in the action of trespass. *Bernasconi v. Fairbrother*, 7 B. & C. 379.

2. Where a creditor obtained judgment by *nil dicit* against a trader, and thereupon issued a *fi. fa.* under which the sheriff seized the goods of the trader, who afterwards and before the goods were sold committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice; but, nevertheless, sold the goods, and paid over the proceeds to the execution creditor: Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received. *Quære*, Whether the sheriff was justified in selling the goods after notice of the bankruptcy? *Notley v. Buck*, 8 B. & C. 160.

3. A sheriff, who takes in execution the goods of a bankrupt, is liable in trover to his assignees, although he has no notice of the bankruptcy, and a commission has not been sued out at the time of execution. *Price v. Helyar*, 4 Bing. 597. and 1 M. & P. 541.

EXECUTION CREDITOR.

1. The seizure of the debtor's goods, and the conversion of them into money, extinguishes the debt, so as to entitle the execution creditor to the proceeds, if such conversion is before the bankruptcy. Dict. Bayley, J. *Morland v. Pellatt*, 8 B. & C. 722.

2. If execution is issued on a judgment on a warrant of attorney; but the goods are not sold, as the defendants from time to time made payments to the officer of the sheriff to whom the whole balance is paid on the day before an act of bankruptcy is committed, and the officer pay the sum directed to be levied to the sheriff on the next day, the execution creditor is entitled to the proceeds. *Morland v. Pellatt*, 8 B. & C. 722.

3. Section 108. extends to an execution on a final judgment after a judgment by default. *Cummin v. Welsford*, 6 Bing. 504.

4. If the goods are sold by the sheriff, the execution is valid, although the act of bankruptcy is committed before the return of the writ. *Higgins v. M^r Adam*, 3 Y. & J. 1.

FEEES TO COMMISSIONERS.

See COMMISSIONERS.

FORGERY.

See DEBT PROVEABLE.

FRAUDS, STATUTE OF.

1. If a promise after the bankruptcy be without date, it has been doubted whether the actual date can

be supplied by parol. *Hubert v. Moreau*, 2 Carr. & P. (N.P.) 530.

2. If a promise after the bankruptcy to pay a debt be only by the signature of an initial letter, *semble* that it is not a sufficient signature. *Hubert v. Moreau*, 2 Carr. & P. (N.P.) 530.

FRAUDULENT COMMISSION.

See CONCERTED COMMISSION.

FRAUDULENT CONVEYANCE.

If a sum on bond is due to the wife of a trader, and settled in trust by a post nuptial settlement upon the wife, the settlement is, by the old bankrupt statute, void as against the assignees under a commission against the husband. *Wombwell v. Laver*, 2 Sim. 360.

See ACT OF BANKRUPTCY, 5, 6.

GUARANTEE.

See SURETY.

HABEAS CORPUS.

1. The Vice-Chancellor seems in one case to have discharged on habeas corpus. *Ex parte M^r Gee*, 6 Madd. 206.

2. A bankrupt, brought up by habeas corpus, is not to be discharged because the return to the writ sets forth the warrant of committal imperfectly, and in such a case, the Lord Chancellor, before he

enters upon the question of the validity of the committal, will ascertain whether the warrant is truly set forth in the return, and if it is not so set forth, he will order the return to be amended. In *re Power*, 2 Russ. 583.

3. A witness summoned by commissioners under 6 Geo. 4. c. 16. s. 33., being required and having refused to read certain entries in a ledger, to which he had previously referred during his examination, but which he had not been called upon to produce, was committed by them for refusing to answer a question: Held, that the warrant was bad in substance and in form, the request to read not being a question. *Ex parte Isaac*, 1 Mont. & Maca. 23.

4. Upon a commitment for refusing to sign, the conclusion should be that he be committed until he sign; and if the conclusion is "until he shall submit himself, and full answer make to the satisfaction of the commissioners to all such questions as shall be put to him, and sign and subscribe his examination," the warrant is defective, and the prisoner entitled to his discharge. *Ex parte Leake*, 9 B. & C. 235.

5. Where a party, committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must bear the expence of that proceeding. *Ex parte Baxter*, 8 B. & C. 344; 1 Mont. & Maca. 16.

6. The warrant of commitment of a bankrupt, being by mistake dated the 2d March, instead of the 2d of February: Held, that this is not such an error as can be amended under the 18th section of Geo. 2. c. 30. *Ex parte M^r Gee*, 6 Mad. 206.

See COMMITMENT. MORTGAGE, 1.

INDIA.

In 9 G. 4. c. 73. entitled "an act to provide for the relief of insolvent debtors in the East Indies, until the 1st of March 1838," there are some enactments respecting bankruptcy which are deserving notice; they will be found in section 12 to section 22—the marginal notices of which sections are as follows:—

Sect. 12. The filing a petition of an insolvent in the court in India to be accounted an act of bankruptcy.

Sect. 13. Commission may issue on certificate of proof of debt, by an Indian creditor before Insolvent Court.

Sect. 14. Assignees protected for acts done prior to the commission of bankruptcy.

Sect. 15. Creditors whose debts have been allowed in Court to receive equal dividend with creditors under any commission of bankruptcy.

Sect. 16. As to surrender of persons declared bankrupt upon filing petition to the Court only.

Sect. 17. Creditors and commissioners may sign certificate of bankrupt, &c.

Sect. 18. No Indian creditor to vote in the choice of assignees, except petitioning creditor if resident.

Sect. 19. Partnership creditors.

Sect. 20. Notices to be inserted in the Gazettes of the presidencies and in the London Gazette.

Sect. 21. Production of the London Gazette containing such notice to be sufficient evidence.

Sect. 22. When no commission of bankruptcy shall issue, assignees appointed by the Court may administer estate.

INDICTMENT. PENDENCY OF.

The pendency of an indictment is not a ground for deferring the hearing of a petition to supersede a commission of bankrupt, if the parties indicted do not object to proceed. *Ex parte Bromley*, 1 Mont. & Maca. 92.

INFANT.

A commission against an infant is void at law. *O'Brien v. Currie*, 3 C. & P. 283.

INJUNCTION.

See JURISDICTION, 2. 5.

INTEREST.

1. Interest at twenty per cent. cannot be recovered on the common money counts, unless the commissioners have settled an account, and charged the assignee with interest. *Beresford v. Birch*, 1 C. & P. 373.

2. The 132d sect. of the 6 Geo. 4. c. 16. as to the allowance of interest to simple contract creditors, is not retrospective. *Ex parte Shepard*, 1 Mont. & Maca. 67.

IRRELEVANCY.

A petition for the payment of costs, previously ordered, which stated additional allegations: Held to be irrelevant. *Ex parte Hinton*, 1 Mont. & Maca. 207.

INSOLVENT.

See INDIA.

ISSUE.

1. If, upon hearing a petition to supersede for fraud in concocting a trading and petitioning creditor's debt, the Court requires further investigation, and an issue would not do justice to all parties interested, without occasioning great expence and great complexity in the proceedings, the Court will prefer a reference to the commissioners. *Ex parte Hudson*, 2 Russell, 457.

2. If, upon petition to supersede for fraud in concocting a trading and petitioning creditor's debt, and praying costs against several persons, an issue is directed, such directions ought to be given as to give each person interested an opportunity of protecting himself at the trial. *Ex parte Hudson*, 2 Russell, 457.

ISSUING COMMISSION.

See COMMISSION.

A covenant not to sue, arrest, implead, or prosecute a debtor, or his goods or chattels, lands or tene-

ments, on account of a debt, extends to the issuing of a commission, which is a species of suit and proceeding against the goods of the bankrupt. *Small v. Marwood*, 9 B. & C. 300.

JUDGMENT CREDITOR.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff for monies levied under an execution upon a judgment by *nil dicit*. *Mitchell v. Knott*, 1 Sim. 497.

JURISDICTION.

1. The lease of a house belonging to the bankrupt having been sold by auction under the usual order, the Court directed the assignees to execute an assignment, and the bankrupt to deliver up possession to the purchaser: Upon refusing to comply, the bankrupt was ordered to be committed. *Ex parte Hawkins*, 1 Mont. & Maca. 115.

2. Where a party has presented a petition in bankruptcy, seeking relief and benefit under a commission, in respect of a particular transaction, he was restrained by an order of the Court from putting in issue the validity of the commission, in an action commenced against him by the assignees in respect of the same transaction. *Ex parte Anderson*, 1 Mont. & Maca. 177.

3. There is no settled rule of the Court to prevent the Lord Chancellor from rehearing a petition of appeal in bankruptcy. *Ex parte Baker*, 1 Mont. & Maca. 279.

4. The Court, sitting in bankruptcy, has no jurisdiction to direct that the personal representative of a deceased assignee shall account for the personal estate of the bankrupt in his hands. *Ex parte Crowe*, 1 Mont. & Maca. 281.

5. Where A., having proved a debt under a commission against B., brought an action and obtained judgment against B. for the amount so proved, a sum attempted to be proved, and other sums advanced after the bankruptcy, and upon this judgment sued out execution, and caused property of B., in the possession of his assignees, to be taken in execution, the Court ordered the execution to be withdrawn altogether: *Quære*, whether the Court would have so interfered if the judgment and writ of execution had not included the sum proved under the commission. *Ex parte Chambers*, 1 Mont. & Maca. 130.

See PROCEEDINGS IN BANKRUPTCY.
COMMISSIONERS.

KEEPING HOUSE.

See ACT OF BANKRUPTCY, 12 to 19.

LESSEE.

If a lease is delivered up by the lessee, in pursuance of 6 G. 4. c. 16. s. 75., it does not operate, by relation, as a surrender of the lease from the date of the commission. *Tuck v. Fyson*, 6 Bing. 330.

LIEN.

See EXECUTION CREDITOR.

1. It seems that there is not any lien by a stereotype printer on the plates for his general balance. *Bleaden v. Hancock*, 1 Moody & M. 466.

2. Whether a printer who has a general lien on stereotype plates has a right to sell has been doubted. *Bleaden v. Hancock*, 1 Moody & M. 466.

3. As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much, but as between one class of creditors and another there is not the same reason for favour. *Per Best, C. J. Jacobs v. Latour*, 5 Bing. 130.

4. Section 108. comprises every species of judgment, except judgment after verdict, trial by the record, and on demurrer. *D. Tindal, C. J. Cummin v. Welford*, 6 Bing. 501.

LIME BURNER.

See TRADING, 3, 4. 5. 7.

LIMITATION OF ACTIONS.

See ASSIGNEES.

1. A debtor to a bankrupt, when sued by his assignee, cannot set up the statute of limitations as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 2 C. & P. (N. P.) 91.

2. An acknowledgment of a debt by one of two partners, made after he has obtained his certificate, is

not sufficient to take the case out of the statute of limitations, so as to charge the other partner. *Martin v. Bridges*, 3 C. & P. 83.

LYING IN PRISON.

See ACT OF BANKRUPTCY, 20, 21.

MEMBER OF PARLIAMENT.

See ACT OF BANKRUPTCY, 26.

MESSENGER.

1. The 27th section of 6 Geo. 4. c. 16. does not give power to break open all houses, &c. where the bankrupt's property is reputed to be, but only any house, &c. of the bankrupt's. Per Bayley, J. *Edge v. Parker*, 8 Barn. & C. 700.

2. The messenger, under a commission of bankrupt, may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, though the party was since declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignees out of the estate. *Burwood v. Kant*, 2 C. & P. (N.P.) 123.

MORTGAGE.

1. A solicitor, summoned as a witness by commissioners, under the 6 G. 4. c. 16. ss. 33, 34. to produce a mortgage deed of the bankrupt's property, refused to produce such deed, and was committed by them

for not answering satisfactorily: Held, that the warrant was defective in form, and that the commitment ought to have been for not producing. All documents required to be produced should be described in the body of the summons, previously to such summons being signed by the commissioners. *Ex parte Froud*, 1 Mont. & Maca. 269.

2. If a mortgagor, in possession, become bankrupt, and the mortgagee give notice to the tenants to pay him the by-gone rents, a payment to the mortgagee is good against the assignees of the mortgagor. *Pope v. Biggs*, 9 B. & C. 245.

3. Payments agreed to be made by an occupier of the soil under a parol licence to dig earth and make bricks, are in the nature of rent, and as such a mortgagee of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may become due afterwards. *Ex parte Hankey*, 1 Mont. & Maca. 247.

MUTUAL CREDITS.

Bankers notes bought by a debtor after the banker has stopped payment, and before an act of bankruptcy is committed, may be set off in an action by the assignees. *Hawkins v. Whitten*, 10 B. & C. 217.

See SET-OFF.

MULTIFARIOUSNESS.

The petition of three creditors for an order to prove three distinct debts held to be multifarious. The

on the business for many years with the stock and capital which existed at the time of the bankruptcy, and the stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.: Held, that the assignees of A. were entitled to three eighths of the profits which had been made or should be made until the concern was finally wound up, and to three eighths of the money, to be produced by the sale of what remained in specie of the capital and stock; and that A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business beyond his share of the original capital. *Crawshaw v. Collins*, 2 Russ. 325.

7. An agreement to share the profits of a member of a firm constitutes a debt proveable against the member for the share. *Ex parte Dodgson*, 1 Mont. & M. 445.

PAYMENT PROTECTED.

If a prisoner obtain a day rule to receive from an insurance office the amount of a loss by fire, and a creditor, knowing the day when the money was to be paid, press for and obtain payment on the same day, and there is not any fraud, the payment is protected by 6 Geo. 4. c. 16. s. 82. *Churchill v. Crease*, 5 Bing. 178.

PETITION.

See ATTESTATION. COSTS. PRACTICE. SUPERSEDEAS. REFERENCE TO COMMISSIONERS. HEARING. INDICTMENT.

1. A petition for the payment of costs, previously ordered, which stated additional allegations: Held, to be irrelevant. *Ex parte Hinton*, 1 Mont. & Maca. 207.

2. A motion cannot be made to adjourn a petition in bankruptcy; a petition in the bankruptcy is necessary for that purpose. *In re Hardy and Dale*, 6 Mad. 252.

3. If, upon a petition to supersede by a creditor, where judgment on a warrant of attorney is alleged by the respondents to have arisen out of usurious dealings, which the petitioner denies, the validity of the debt of the petitioner ought, in the first instance, to be ascertained. *Ex parte Hudson*, 2 Russ. 456.

4. A petition presented by a bankrupt in person, and which he appears to support, may be signed by him and need not be attested, and if it is attested by a person who is not a solicitor, and who does not state himself to be the agent of the petitioner, it is not defective. *In re Bruce*, 4 Russ. 223.

5. An application to the Court to vary the minutes of an order before they have been settled in the secretary's office is irregular. *Ex parte Vittery*, 1 Mont. & Maca. 435.

PETITIONING CREDITOR.

1. Where a petitioning creditor died after the issuing of the commission, and before adjudication, it

was ordered, that the commissioners should be at liberty to adjudicate upon the deposition of his executors. *Ex parte Tanner*, 1 Mont. & Maca. 292.

2. The provision in the statute requiring an affidavit, on striking a docket, that the party is bankrupt, is directory only, and the commission would be valid without any such affidavit. *Simpson v. Sikes*, 6 M. & S. 311.

3. The correctness of the bond given on striking the docket cannot be disputed at *Nisi Prius*. *Folks v. Scudder*, 3 C. & P. 232.

4. It has been ruled, that if a person, who is not the petitioning creditor, employ an attorney to sue out a commission of bankrupt where no effects are received under the commission, he is liable to the attorney. *Pocock v. Russen*, 1 Moody & M. 358.

5. The assignees, after the trial of an action, commenced by them, where it appeared that there was not a sufficient trading to support the commission, and after other acts under the commission, presented a petition to have the commission superseded, and that all costs and expences incurred might be paid by the petitioning creditor: Held, that the application came too late, and that the petitioning creditor was not responsible. *Ex parte Paul*, 1 Mont. & Maca. 185.

6. In an action against a petitioning creditor under a former commission, who illegally compounded with the bankrupt, the supersedeas of the former commission is conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623.

7. The debt of the petitioning creditor must be found insufficient before the Lord Chancellor can order a new debt to be substituted

under sect. 18. 6 Geo. 4. c. 16. *Muskett v. Drummond*, 10 B. & C. 161.

8. Doubt has been entertained whether an order by the Lord Chancellor substituting a new petitioning creditor's debt is sufficient to support the commission in an action commenced by the assignees against a debtor before the order is made. *Muskett v. Drummond*, 10 B. & C. 161.

PETITIONING CREDITOR'S DEBT.

1. Where A. deposits with B. goods to be sold, and on a sale being effected, the profits, after deducting the cost price, &c. are to be equally divided between them; but the loss, if any, is to be borne exclusively by A.; if B. effect a sale and receive the money, the debt due from him to A. is sufficient to support a commission of bankruptcy against B. *Marson v. Barber*, 1 Gow. 17.

2. It has been agitated, whether a debt, founded upon notes of a country banker, payable on demand, where no demand had been made, is sufficient to support a commission; but a prior debt is not extinguished by such notes having been given. *Simpson v. Sikes*, 6 M. & S. 295.

3. If by a composition deed an insolvent assign to four trustees all his goods, for the benefit of his creditors, provided the trustees and the creditors on or before a given day prove their debts, if required, and execute the deed, and there is a covenant by the trustees and creditors that they will not arrest, implead, or prosecute the debtor, or

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any of his goods, chattels, lands, or tenements, on account of their debts, and on such suing or prosecution the deed shall be a discharge; and the deed is executed by two only of the trustees, the debt of a trustee who has executed it is extinguished, and he cannot sue out a commission of bankruptcy on it. *Small v. Marwood*, 9 B. & C. 300.

4. If the deposition of the petitioning creditor's debt is as indorsee of a bill of exchange, it is not sufficient unless it appears that the bill was outstanding against the bankrupt before the act of bankruptcy. *Key v. Cook*, 2 M. & P. 730.

5. It has been ruled, that a debt for money lent on mortgage, payable after six month's notice, such notice not to expire before a certain day, is a good petitioning creditor's debt, without any notice given, and more than six months before the certain day. *Hill v. Harris*, 1 Moody & M. 448.

6. If a party agree to take a work which is to be published in eighteen months, at intervals of two months, the debt due for the numbers delivered is sufficient. *Mayor v. Payne*, 2 C. & P. 91.

7. Under 6 Geo. 4. c. 16. s. 127. the assignees under a second commission, where the bankrupt has not paid 15s. in the pound, take, from the date of the assignment, a present vested interest, by operation of law, in all future estate acquired by the bankrupt. A bankrupt, under such circumstances, although he has obtained his certificate under the second commission, cannot, as a petitioning creditor, issue a commission of bankrupt. Ex parte *Robinson*, 1 Mont. & Maca. 44.

8. Taxed costs upon a judgment, as in case of a nonsuit, under a rule of Court, do not constitute a good

petitioning creditor's debt. Such costs are recoverable only by attachment, in the nature of an execution. Ex parte *Stevenson*, 1 Mont. & Maca. 262.

PLEADING.

If a declaration on a bill of exchange states, that it was indorsed to the plaintiffs as the surviving assignees of a bankrupt after the bankruptcy, the plaintiffs must prove that the bill was indorsed to them, after the bankruptcy, as *surviving* assignees. *Barnisconi v. Duke of Argyle*, 3 C. & P. 29.

See ACTION.

PLEA OF BANKRUPTCY.

1. A plea of plaintiff's bankruptcy must state the trading, and all the particulars necessary to lead to the issuing of a commission, and aver positively that the party *was* a bankrupt; a plea, therefore, only alleging the commission under which he was duly found and adjudged a bankrupt, held insufficient. *Gwinness v. Carroll*, 2 M. & Ry. 132.

2. If a plea is delivered without a notice, and upon the clerk discovering that he had omitted to give notice, he gets the plea back, and before the expiration of the time for pleading, he delivers a fresh plea with a notice, it is too late. *Lawrence v. Crowder*, 3 C. & P. 230.

3. A general plea of bankruptcy under the statute must pursue the

terms of the statute, and conclude to the country. *Sheen v. Garrett*, 6 Bing. 686.

POLICY OF ASSURANCE.

If a trader effect a policy of assurance on his life, and assign it to a creditor, and the creditor do not give notice to the office, and the office neither requires notice to be given to give effect to the validity of assignments, nor recognizes such notice when given, the interest in the policy passes to the assignees under the commission. *Williams v. Thorp*, 2 Sim. 259.

PRACTICE.

See SUPERSEDEAS.

PREFERENCE.

See ACT OF BANKRUPTCY, 7. to 11.

1. A trader stopped payment generally on the 5th of January, and on the evening of the 6th sent a 100*l*. note to a particular creditor, saying it was to help him over his payments: Held, that such a trader, afterwards becoming bankrupt, his assignees might recover the money in assumpsit, although it appeared that at the time of payment a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's ac-

commodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because he being a party to it, the payment operated *pro tanto* in his discharge. *Guthrie v. Crossley*, 2 C. & P. (N.P.) 301.

2. If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, bills and notes of such an amount that, if assistance is not given, the bank must fail, and such assistance is not given, it is a preference, although, at the time, there is not any contemplation of an act of bankruptcy. *Simpson v. Sikes*, 6 M. & S. 316.

3. It has been ruled, that a fraudulent gift of money, in contemplation of insolvency, may be avoided by the assignees. *Abell v. Daniell*, 1 Moody & M. 371.

4. If a trader, to enable him to complete a large order from the East India Company, borrow money upon an agreement that the lender shall receive from the East India Company the money to become due for the order, and repay himself, and at the time of the loan the lender knows the trader to be in insolvent circumstances, and before the money is due from the East India House, the trader is several times arrested and bailed by the lender; and the money is received by the lender and applied by him in discharge of the loan without notice of an act of bankruptcy, it is not a fraudulent preference. *Hunt v. Mortimer*, 10 B. & C. 44.

PROCEEDINGS IN BANKRUPTCY.

1. Dict. Best, C.J. *Mayor v. Pyne*, 2 C. & P. 92. I wish it never was competent in a Court of Nisi Prius, to dispute the proceedings in bankruptcy; it would be much better to petition the Court of Chancery.

2. Proceedings in bankruptcy are not proceedings in equity. *Crowder v. Davies*, 3 Y. & J. 433.

3. A demurrer does not lie to a bill by assignees, on the ground that it does not state the suit to be instituted with consent of the creditors or of the commissioners. *Jones v. Yates*, 3 Y. & J. 373.

4. An application to the court for an order to enrol the proceedings, under 6 Geo. 4. c. 16. s. 96., must be on petition. Assignees who refuse, at the request of parties interested, to enrol proceedings, which, before the 6 Geo 4. c. 16., they were bound to produce on a subpoena duces tecum, refuse at the peril of costs. Ex parte *Johnstone*, 1 Mont. & Maca. 82.

PROOF.

1. The statute 49 G. 3. c. 121. s. 14., which enacts that creditors who shall have brought an action against the bankrupt shall not be at liberty to prove under the commission without relinquishing such action, extends to prevent a creditor who is suing two partners, from proving his debt under a separate commission issued against one. *Blannin v. Taylor*, 1 Gow. 199.

2. Where a creditor is disabled by age and imbecility of mind from proving, by his own oath, a debt

against the estate of a bankrupt, the commissioners will be directed to admit the proof upon such evidence as shall be satisfactory to them, though the debt be of considerable amount. Ex parte *Clarke*, 2 Russ. 575.

Consequence of.

See ELECTION.

PUIS DARREIN CONTINUANCE.

See CERTIFICATE, 9.

PURCHASER.

A *bona fide* purchaser, for ready money, of goods sold, after an act of bankruptcy, without notice, is entitled to retain them under a commission which issues within two months, if the assignees do not repay the money. *Hill v. Farnell*, 9 B. & C. 45.

See REPUTED OWNER.

RECEIVER.

A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust estate in a large sum; and for some time no steps were taken to have his accounts duly passed: Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. *Dawson v. Raynes*, 2 Russ. 466.

REFERENCE TO COMMISSIONERS.

A reference to the commissioners, to review the proof of the trading, and of the petitioning creditor's debt, substituted for the trial of an issue as to the validity of the commission. *Ex parte Hudson*, 2 Russ. 456.

REHEARING.

There is no settled rule of the Court to prevent the Lord Chancellor from rehearing a petition of appeal in bankruptcy. *Ex parte Baker*, 1 Mont. & Maca. 279.

RELATION.

1. Under 6 Geo. 4. c. 16. s. 81. where the computation of time is to be from an act done, the day when such act is done is to be included. *Semble* that for some purposes the Court notices the fraction of a day. *Ex parte Farquhar*, 1 Mont. & Maca. 7.

2. The 82d section, with respect to payments after an act of bankruptcy, has a retrospective operation. *Churchill v. Crease*, 5 Bing. 180; *Terrington v. Hargreaves*, 5 Bing. 489.

3. It has been ruled, that the delivery of goods upon a threat of arrest is not a payment within section 82. *Smith v. Moon*, 1 Moody & M. 458.

4. A *bona fide* purchaser, for ready money, of goods sold, after an act of bankruptcy, without notice, is entitled to retain them under a commission which issues within two

months, if the assignees do not repay the money. *Hill v. Farnell*, 9 B. & C. 45.

5. If, after a secret act of bankruptcy by a trader, a bill is accepted, at three months date, for his accommodation, and, after the transaction, but in the course of the same day, it is agreed, that the trader shall sell to the defendant some property as security for the acceptance, this is not a payment within sec. 82. *Carter v. Breton*, 6 Bing. 617.

6. Section 108, as to invalidating judgments although for a valuable consideration, has a retrospective operation. *Cummin v. Welsford*, 6 Bing. 503.

7. The word dealings, in sect. 81., is as extensive a term as can be used, and extends to payments made by the bankrupt. *Tucker v. Barrow*, 3 C. & P. 88.

8. If a payment is made, by a partner who has committed an act of bankruptcy, of a joint debt, to a creditor who has notice of the act of bankruptcy, it is not protected. *Craven v. Ednonsen*, 6 Bing. 734.

9. A purchaser of property under a commission which is afterwards superseded by a creditor, is not protected by sect. 87. 6 Geo. 4. c. 16. against the claim of the assignees under a subsequent commission. *Gould v. Shoyer*, 6 Bing. 738.

See RELEASE.

RELEASE.

If a creditor execute a release while he is in prison, but after he has committed an act of bankruptcy, but a commission do not issue until

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after the expiration of twelve months, the release is void. *Mayor v. Pyne*, 2 C. & P. 96.

REPUTED OWNER.

1. If A. let a house to B., with a covenant that the lease shall determine on B. committing an act of bankruptcy on which a commission of bankrupt should issue; and by another deed of the same date, A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. become bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants. And if it be proved on the one side that several of the servants of B., and many of his customers, knew that the goods belonged to A., and on the other side, several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit on the faith of them, and that he acted as master of the house, &c., it will be for the jury to say whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them. *Hickenbotham v. Groves*, 2 C. & P. (N.P.) 492.

2. If notice of the assignment of a policy of assurance on a life is not given to the insurers, it remains, upon the bankruptcy of the assignor, in his order and disposition, although the office do not require notice, and keep no book or registry of notices which might be given. *Williams v. Thorp*, 2 Sim. 257.

3. If, after a chariot is built and paid for, and after it is finished, the purchaser direct a front seat to be added, but the coachmaker being slow in the execution of the addition, the purchaser sends for the chariot six or seven times, and the coachmaker promises to deliver it; and, subsequently, the purchaser, being dissatisfied, orders the chariot to be sold, and it is, according to the custom of trade in such case, standing in the coachmaker's warehouse for that purpose, the front seat not having been added, when a commission issues against the coachmaker, the chariot does not pass to the assignees. *Carruthers v. Payne*, 5 Bing. 270.

4. If an innkeeper order a post-chaise of his coachmaker, who lends him an old chaise till the new chaise is ready, and his name is not painted on the old chaise, it is not in the reputed ownership of the innkeeper. *Newport v. Hollings*, 3 C. & P. 223.

5. Notice of an assignment of a chose in action must be given to the debtor before the act of bankruptcy, to prevent the assignees title attaching. D. Parke, J. *Hunt v. Mortimer*, 10 B. & C. 47.

See SHORT BILLS.

RETROSPECTIVE OPERATION.

See ANNUITY, 2. RELATION. CONSTRUCTION OF ACT.

SECOND COMMISSION.

1. Doubts have been entertained whether an action may be main-

tained for a debt due before the commission, against a certificated bankrupt under a second commission, where 15s. has not been paid. *Eicke v. Nokes*, 1 Moody & M. 303.

2. A second commission, issued against a trader before a former commission has been disposed of, is a nullity; and where a bankrupt obtained his certificate under a second commission, issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission. *Till v. Wilson*, 7 B. & C. 684.

SERVANT.

1. A person engaged as a traveller, at an annual salary: Held, to be a servant or clerk within the meaning of the 6 Geo. 4. c. 16. s. 48. *Ex parte Neal*, 1 Mont. & Maca. 194.

2. The workmen of a coach-maker, who worked by the piece, and received a specified sum for each particular job under separate and distinct contracts, and where there was no hiring for a specific time, held to be servants within the meaning of the 6 Geo. 4. c. 16. s. 48. *Ex parte Grellier*, 1 Mont. & Maca. 95.

SET-OFF.

1. A. kept cash with M. & Co. bankers, and accepted a bill, drawn by one of the partners in the house of M. & Co., and indorsed by that partner to M. & Co., who discounted it, and afterwards indorsed it for value to S. Before the bill became

due, M. & Co. became bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to A. When the bill became due, S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. & Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against A. as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and A., and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from M. & Co. at the time of their bankruptcy. *Bolland v. Nash*, 8 B. & C. 105.

2. If a debtor write to his creditor, saying: "Inclosed please to receive two bills, value 1,740*l.*, which place to our credit; and we have to request that you will pay in cash and in course 900*l.* on our account to Messrs. Ransom and Co., bankers; and that you will place the balance, when discounted, to our credit;" and if the letter arrive after the creditor has stopped payment, and the creditor do not procure the bills to be discounted, he cannot set-off any part of the proceeds against his debt. *Buchanan v. Findlay*, 9 B. & C. 740.

3. If bills are sent by a debtor to a creditor for a specific purpose, the creditor cannot apply them to another purpose. *Buchanan v. Findlay*, 9 B. & C. 748.

4. A. proved a debt of 424*l.* against the separate estate of B., and died before B. had obtained his certificate, having bequeathed to B. a legacy of 200*l.*: Ordered, on the petition of the assignee, that

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the sum of 200*l.* should be deducted from the proof of 424*l.* made by A. Ex parte *Man*, 1 Mont. & Maca. 210.

5. If, after a secret act of bankruptcy, a trader sell goods to a person who is surety for him, upon an agreement that the price of the goods shall be set off against the liability, and the trader become a bankrupt, such set-off is not valid. *Carter v. Breton*, 6 Bing. 621. *Quære?*

6. If a creditor consent that his debtor shall set off the debt against a debt due from the creditor to another person, it seems that the agreement, although not in writing, is valid. *Coxen v. Chadley*, 1 C. & P. 174 & 485.

7. Bankers notes bought by a debtor after the banker has stopped payment, and before an act of bankruptcy is committed, may be set off in an action by the assignees. *Hawkins v. Whitten*, 10 B. & C. 217.

SHERIFF.

1. A creditor had obtained judgment by default against his debtor, since the statute 6 Geo. 4. c. 16. s. 108.; and the goods having been seized by the sheriff before, but not sold until after, an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. In *re Washbourn*, 8 B. & C. 444.

2. The sheriff's liability has been again before the Court, in *Dillon v. Langley*, in an action of trover, (before Lord Tenterden, C. J., at Nisi Prius sittings,) brought by assignees to recover the value of

the bankrupt's stock in trade, which had been seized by the sheriff under a *fi. fa.* after an act of bankruptcy, of which notice had been given previous to sale, but not before seizure; when his Lordship observed, that doubts had been entertained, in a very high quarter, whether trover would lie against a sheriff under such circumstances; and not undertaking to decide the point at Nisi Prius, ordered a special verdict, when it is to be hoped this important point will be settled according to the ancient principles of the common law.

N. B. Those who wish to pursue this subject, will find it ably treated in a pamphlet, written by Mr. Burchell, on the sheriff's liability.—*Sturgeon's Bankrupt Act*, p. 58. (note).

See EXECUTION.

SHORT BILLS.

1. A customer is not entitled to recover short bills in the hands of his bankers, at the time of their bankruptcy, where the habit of dealing between the parties was such as to warrant an inference that they mutually considered and treated such bills as cash. Ex parte *Thompson*, 1 Mont. & Maca. 102.

2. If short bills are delivered by a banker, on the eve of his bankruptcy, to a third person, who receives payment, and pays the money to the assignees, trover does not lie, but assumpsit. *Tennant v. Strachan*, 1 Moody & M. 378.

3. By the terms of agreement between F. and Co. and their bankers S. and Co., the permission to discount indorsed bills of exchange

was limited to the amount necessary to meet such acceptances of F. and Co. as were in the course of immediate payment at the house of S. and Co. To cover certain acceptances becoming due, F. and Co. remitted to S. and Co. an indorsed bill of exchange; these acceptances were, however, dishonoured by S. and Co., who soon afterwards stopped payment. S. and Co. then procured the bill to be accepted, and made an entry in their books of their having discounted it. A commission of bankrupt having issued against S. and Co.: Held, that S. and Co. had no right to discount the bill without executing the trust reposed in them, and that their assignees were bound to deliver up the bill to F. and Co. Ex parte *Frere*, 1 Mont. & Maca. 263.

SIGNATURE.

See FRAUDS, STATUTE OF.
ATTESTATION.

SOLICITOR.

1. It is not requisite that a bill for business in bankruptcy should be taxed under 6 Geo. 4. c. 16. s. 14. before the commencement of an action. *Crowder v. Davies*, 3 Y. & J. 433.

2. An attorney's bill for business in bankruptcy need not be delivered to the assignees a month before an action is commenced. *Crowder v. Davies*, 3 Y. & J. 433.

3. An assignee ought not to act as solicitor under the commission. Ex parte *Badcock*, 1 Mont. & Maca. 243.

4. In an action against annuity brokers, bankrupts, for laying out the money of a person on bad security, the solicitor under the commission is compellable to produce their books. *Hawkins v. Howard*, 1 C. & P. 222.

See COSTS.

STATUTE.

Sections retrospective, 54, 55. 82.

Sections not retrospective, 92.

Construction of.

See BANKRUPT ACT, 1, 2, 3, 4.
LIEN. RELATION.

The repeal of a repealing statute revives the former acts. *Phillips v. Hopwood*, 10 B. & C. 38.

STOPPAGE IN TRANSITU.

If the consignee of goods, upon discovering his insolvency, give notice to the wharfinger not to deliver the consignment, the goods remain in the consignor. *Bartram v. Fairbrother*, 4 Bing. 579.

SUBSTITUTION OF DEBT.

1. On a petition to substitute under 6 G. 4. c. 16. s. 18. although a previous application to the commissioners be required, an order by them to expunge the petitioning creditor's debt is not absolutely necessary. Ex parte *Robinson*, 1 Mont. & Maca. 44.

2. The 6 Geo. 4. c. 16. s. 18. is applicable to a case, not only of

deficiency in the amount, but to any original defect in the nature of the petitioning creditor's debt. Ex parte *Hall*, 1 Mont. & Maca. 39.

See PETITIONING CREDITOR'S DEBT, 7, 8.

SUMMONS.

All documents required to be produced should be described in the body of the summons, previously to such summons being signed by the commissioners. Ex parte *Frowd*, 1 Mont. & M. 269.

SUPERSEDEAS.

See CONCERTED COMMISSION.

For Misdescription.

1. Where the bankrupts were described as "late of the Kent Road, coal merchants," and it appeared that they had quitted that trade in 1826, and had since been separately engaged in farming: Held, that the description was insufficient, and that the commission should be superseded. Ex parte *Day*, 1 Mont. & Maca. 208.

Delay.

2. Commission issued 23d May 1826, and not opened until 19th March 1827, superseded on the ground of improper delay. Ex parte *Best*, 1 Mont. & Maca. 63.

3. Commission sealed, but not opened, cannot be superseded, at the instance of the petitioning creditor, without serving the bankrupt, or shewing that he cannot be found, Ex parte *Forth*, 1 Mont. & Maca. 10.

Previous Commission.

4. A commission against T. C. and three others, superseded as to T. C., on the petition of the assignees, under a commission previously issued against T. C. and another. In the matter of *Coleman*, 1 Mont. & Maca. 15.

Consent of 9-10ths.

5. All that is enacted by the 6 Geo. 4. c. 16. s. 133. is, that when a certain proportion of the creditors agree to take a composition, the chancellor may supersede. It does not at all interfere with the rights or securities of persons not parties to the agreement. Per Lord Tenterden. *Tuck v. Tooke*, 9 B. & C. 437.

Estoppel.

6. If a person, against whom a commission of bankrupt is sued out, apply to a judge at chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is by so doing precluded from disputing the validity of the commission in a court of law, but may apply to the great seal. *Watson v. Wace*, 2 C. & P. (N. P.) 171.

7. If a creditor apply to prove his debt, and the bankrupt, upon such application, say to the creditor, "You must give me my discharge before you prove," and he is discharged accordingly, but at the same time saying that it is his intention to dispute the commission as he is not a trader, it is unsettled whether he can maintain an action to dispute the commission. *Mott v. Mills*, 3 C. & P. 198.

8. If, after a commission has issued, the supposed bankrupt, an

auctioneer, and the assignees meet, a short time before the sale of the goods, and consult as to the best means of disposing of the property, and the supposed bankrupt is, at the time when the commission issues, in possession of an unproductive farm, and he gives notice to the lessor, saying, "I ———, a bankrupt, do hereby give you notice that I am ready and willing, and hereby offer to give up and deliver unto you the lease and possession;" and in consequence of this notice the lessors accept the lease, and receive possession of the premises, the supposed bankrupt is not estopped from disputing the validity of the commission. *Heane v. Rogers*, 9 B. & C. 578.

9. Bankrupt bringing an action to try the validity of the commission, cannot at the same time proceed with a petition to supersede it on the same grounds. *Ex parte Burgess*, Jacob, 559.

General.

10. Commission sealed, but not opened, ordered to be superseded, at the instance of the petitioning creditor, reserving to the bankrupt, in the order, all his rights, whether by action or petition. *Ex parte Palmer*, 1 Mont. & Maca. 211.

11. Commission superseded, upon a petition presented on the 13th day from the date of the commission, on the ground of fraudulent collusion between the bankrupt and the petitioning creditor. In the matter of *Levy*, 1 Mont. & Maca. 11.

12. If, upon a petition to supersede by a creditor, where judgment on a warrant of attorney is alleged by the respondents to have arisen out of usurious dealings, which the petitioner denies, the validity of the

debt of the petitioner ought, in the first instance, to be ascertained. *Ex parte Hudson*, 2 Russ. 466.

See CONCERTED COMMISSION.

SURETY.

1. If a creditor sue a surety on a guarantee, and the principal debtor become bankrupt, and the creditor prove the debt; and the surety give notice to the creditor that, though he does not admit his liability as surety, he shall, if the creditor sign the certificate, hold himself altogether discharged; and after issue joined in the action, but before trial, the creditor sign the certificate, which, without such signature, the bankrupt could not obtain, and the certificate is allowed, and the creditor obtain judgment in the action, the surety is not discharged from his liability. *Browne v. Carr*, 2 Russell, 600.

2. A creditor, pending an action on a guarantee against a surety, who contests the question of his liability, proves the debt under a commission of bankrupt against the principal debtor, and by his signature enables the bankrupt to obtain his certificate, though the surety had given him notice not to sign it; the surety is not thereby discharged from his liability on the guarantee. *Browne v. Carr*, 2 Russ. 600.

3. A surety for a lessee is liable in respect of breaches of covenant, which accrue after the date of a commission against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under 6 G. 4. c. 16. s. 75. *Tuck v. Fyson*, 6 Bing. 330.

See RECEIVER.

SURRENDER.

Time enlarged for bail to surrender their principal, who had become a bankrupt, for the purpose of his examination. *Offley v. Dickens*, 6 M. & S. 348.

TAXATION OF COSTS.

See COSTS.

TRADING.

1. If a person get orders for coals, having no stock of his own, but buying them from those who have, and then sells them, with invoices in his own name, he is a trader, although he obtain the coals from a merchant, and has neither wharfs, lighters, nor carts of his own. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

2. If a middle man, between coal merchant and customer, get orders for coals, with which the merchant supplies the customer, and pay a commission to the middle man, this is not a trading by buying and selling. *Doe v. Lawrence*, 2 Carr. & P. (N.P.) 135.

3. If a person manufacture bricks from his own estate, and, according to the usual mode of burning the clay into bricks, he buys chalk and burns it with the clay, not for the purpose of carrying on lime-burning as a business, but as the most convenient mode of burning the clay into bricks, it is not a trading, although the use of the chalk was not necessary for the manufacture of the bricks, and he subsequently sell the lime produced in the process. *Paul v. Dowling*, 1 Moody & M. 267.

4. If a person burn chalk, not the produce of his own land, and sells the lime, it is a trading. *Paul v. Dowling*, 1 Moody & M. 267.

5. A person who burns chalk, the produce of his own land, and sells the lime, is not, as it seems, a trader. *Paul v. Dowling*, 1 Moody & M. 267.

6. A man is not a trader for manufacturing and selling bricks, the produce of his own estate. *Paul v. Dowling*, 1 Moody & M. 267.

7. If a lime-burner commence the building a large mansion-house on his estate, and employ nearly all the bricks and lime made at the kiln, and considerable quantities of lime besides for that purpose, and from the time of commencing the building he continues to purchase chalk, but very nearly discontinues any sale of lime, except in some few instances, and generally under particular circumstances, as to be spread on the lands of tenants or neighbours, or to be used in the repairs of houses in the parish, on some reason of urgent haste, and there are some instances in which no such explanation is given, but in every case the lime is paid for, and the whole quantity sold does not exceed five quarters, during a period in which the kiln has produced not less than 300 quarters of lime, of which the rest is employed about the building, the question, whether this is a continuance of the trading, depends upon its having been with intent to keep the trade in existence after the house was finished, or merely to accommodate the purchasers. *Paul v. Dowling*, 1 Moody & M. 267.

8. If a person buy a piece of land in fee, partly for the purpose of

making bricks, and the payment is to be by instalments, and 4s. per 1,000 is to be paid to the vendor, in part liquidation of the purchase money, and bricks are made from soil dug from the land, and sold, this is not a trading. *Heane v. Rogers*, 9 B. & C. 578.

9. If a man buys, and represents himself as a dealer, and offers goods in exchange, it has been ruled, that it should be left to the jury to say, whether he did not buy to sell again. Per Abbot, C. J. *Millikin v. Brandon*, 1 C. & P. 380.

10. It has been ruled, that a buying in connection with others, to carry on a system of fraud, is not a trading. Per Abbot, C. J. *Millikin v. Brandon*, 1 C. & P. 380.

11. A ship-broker is, as such, liable to the bankrupt laws. *Pott v. Turner* 6 Bing. 702.

12. A trading which ceased before the 6 Geo. 4. c. 16. took effect, will not support a commission issued after that time. *Surtees v. Ellison*, 9 B. & C. 750. Ex parte *Batten*, 1 Mont. & Maca. 287.

TRIAL.

See WITNESS, 9.

TROVER.

1. In trover for a bill of exchange, delivered as a fraudulent preference, non-delivery of the bill upon demand, after it is due, and payment has been made, is not a conversion. *Jones v. Fort*, 9 B. & C. 764.

See ASSIGNEES.

TRUST ESTATES.

1. Under the 6 G. 4. c. 16. estates, of which a bankrupt is seised as a bare trustee, do not pass to his assignees. Ex parte *Gennys*, 1 Mont. & Maca. 258.

2. The assignees of a bankrupt are not necessary parties to the conveyance of an estate of which the bankrupt was seised as trustee. Ex parte *Gennys*, 1 Mont. & Maca. 258.

TRUST.

1. If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, money, bills, and notes, and such assistance is not given, and the London banker, after the bankruptcy, convert the bills and notes into money, the assignees, under a commission against the country bankers, may maintain assumpsit for the money. *Simpson v. Sikes*, 6 M. & S. 318.

2. A. assigned a leasehold messuage and household furniture to B. upon trust for the use of A. for life, and after his decease, for the use of C. his wife, for life, and after the decease of the survivor, for the use of their daughter D. A. occupied the messuage, with the furniture, until Oct. 1816, when he died. In Oct. 1817, C., the widow, married E., who immediately took possession of the messuage and furniture, and continued in possession until Oct. 1828, when a commission of bankruptcy issued against him.

3. In Oct. 1818, E. had procured B to assign the messuage and furni-

ture to him by a deed, which contained false recitals, and was in breach of the trust: Held, under these circumstances, on the petition of C. and D., that the furniture was not in the order and disposition of the bankrupt E., and that his assignees should be restrained from selling the same. *Ex parte Horwood*, 1 Mont. & Maca. 169.

UNCERTIFICATED BANKRUPT.

1. A commission having issued against A., B., and C., and it being subsequently discovered that B. was an uncertificated bankrupt, the commission was ordered to be wholly superseded. *Ex parte Wray*, 1 Mont. & Maca. 195. *Quere*, Whether a joint commission, invalid in its concoction as to one partner, can, after a supersedeas as to that one partner, be rendered valid against the remaining partners? *Ibid*.

2. It has been said, that an uncertificated bankrupt can have no property, no rights of action even against third persons, without the assent of his assignees. *D. Tindal, C. J. Chambers v. Bernasconi*, 6 Bing. 501. But *qu.*?

3. An uncertificated bankrupt, cannot in an action to try the validity of the commission, hold his assignees to bail. *Chambers v. Bernasconi*, 6 Bing. 500.

4. If a lessee become bankrupt, the term remains vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provisions of 6 G. 4. c. 16. s. 75. *Tuck v. Fyson*, 6 Bing. 390.

5. An uncertificated bankrupt can have no right to property as against his assignees. *D. Tindal, C. J. Chambers v. Bernasconi*, 6 Bing. 501.

VALID PAYMENTS.

1. If a trader give an authority to a broker to receive rents from his tenants, and upon a creditor applying for payment, the trader direct the broker to pay the creditor out of the rents; and the broker not having received the rents promise to pay it as soon as he received it from the tenants; and the trader become bankrupt, and after the issuing of a commission the broker pay the money to the creditor; the assignees cannot recover the amount from the broker. *Bedford v. Perkins*, 3 C. & P. 90.

2. It has been ruled, that if money is received two months before a commission issue, without notice of an act of bankruptcy, it is valid, notwithstanding the receiver had notice of the trader's insolvency. *Tucker v. Barrow*, 3 Carr. & P. 87.

VARIANCE.

An indictment against a bankrupt, under statute 5 Geo. 2. c. 30. for not making a full disclosure of his estate, should truly set out the notice requiring him to surrender. Therefore, where the indictment averred that the notice required the bankrupt to surrender, &c. pursuant to stat. 5 Geo. 2. entitled, &c. and on the production of the notice it appeared that the title to the 49 Geo. 3. was substituted for that

of the 5 Geo. 2.: Held, that the variance was fatal. *Rex v. Burston*, 1 Gow. 210.

WAIVER.

A formal objection successfully urged on one occasion, is not a waiver of the respondent's right to refer for impertinence, when the same petition is again called on for hearing. *Ex parte Cunningham*, 1 Mont. & Maca. 193.

WARRANT.

A warrant under 6 Geo. 4. c. 16. s. 29. can only be granted by a magistrate to the messenger under the commission. *Sly v. Stevenson*, 2 Carr. & P. (N.P.) 464.

WARRANT OF ATTORNEY.

If a warrant of attorney is filed, with an affidavit made by the attesting witness, which states that he "saw the warrant of attorney, bearing date the 25th April 1827, duly signed, sealed, and delivered," but does not specify the day on which it was executed, the affidavit is not in conformity with the directions of the 3 G. 4. c. 39. s. 1 & 2., and the warrant of attorney, the judgment and execution thereon, is void as against the assignees of the defendant, and they may maintain trover against the sheriff for goods seized by him under a *fi. fa.* issued upon such judgment, and sold after the commission. *Dillon v. Edwards*, 2 M. & P. 550.

WARRANT OF COMMITMENT.

The warrant of commitment of a bankrupt, being by mistake dated the 2d March, instead of the 2d of February: Held, that this is not such an error as can be amended under the 18th section of Geo. 2. c. 30. *Ex parte M' Gee*, 6 Mad. 206.

WIFE'S PROPERTY.

A right of entry vested in husband and wife, in right of the wife, passes to the assignees of the husband upon his bankruptcy, and they may recover the freehold by a writ of entry. *Michell v. Hughes*, 6 Bing. 689.

WITNESS.

1. Held, under 6 Geo. 4. c. 16. s. 33. that in order to justify the commissioners in issuing their warrant for the apprehension of a witness, to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was thereby required to attend, and that the question, whether the service of the summons was in that respect reasonable or not, was a question of fact to be submitted to a jury. *Seemle*, that the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served. *Grocock v. Cooper*, 8 B. & C. 211.

2. A creditor of a bankrupt may be asked questions, the answers to which cannot be open to the objection that they are swayed by interest, notwithstanding they may communicate information by which the commission may be sustained. Therefore, a creditor may be asked, if he has in his custody the bond on which the petitioning creditor's debt was founded; and if not, to whom he has delivered it. *Binfield v. Turner*, 1 Gow. 202.

3. In an action for work and labour, an uncertificated bankrupt is a competent witness to prove that the employment of the plaintiff was by him and not by the defendant, by whom the debt has been paid to his assignees. *Wilson v. Gallalely*, 2 Carr. & P. (N.P.) 467.

4. In an action, on a bill of exchange, against the acceptor for the accommodation of the drawer, the drawer who has obtained his certificate is a competent witness for the defendant, to prove that the bill had been usuriously discounted. Per Lord Tenterden, C.J. *Ashton v. Longes*, 1 Moody & M. 127.

5. It has been ruled, that in an action by the assignees the bankrupt is not a competent witness, unless his release and certificate is produced. *Goodhay v. Henry*, 1 Moody & M. 320. Anon. in note to *Goodhay v. Henry*.

6. A creditor is not a competent witness to support a commission of bankrupt; but where the adjudica-

tion was founded upon the evidence of a shopman, who, although a creditor, had stated, at the time of his examination, that he had no claim against the bankrupt, the Court refused to supersede the commission. *Seem*, that if the objection be not taken before the commissioners, at the time of the examination, it cannot afterwards be urged as an objection to the commission. Ex parte *Hills*, 1 Mont. & Maca. 272.

7. Order made that a witness who had been twice committed by commissioners of bankrupt, should be again examined by them, on tendering to the solicitor under the commission the costs of the meeting, as of being brought up. Ex parte *Baxter*, 1 Mont. & Maca. 16.

8. A creditor cannot in any case be a witness to support the commission. *Hallen v. Homer*, 1 Carr. & P. 108.

9. It has been ruled, that it is not a sufficient ground for the postponement of a trial that the bankrupt is an important witness, and will shortly be competent, by the Chancellor's allowance of his certificate, which has been signed by the commissioners. *Tennant v. Strachan*, 1 Moody & M. 378.

WRIT OF ENTRY.

See WIFE'S PROPERTY.

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